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No. ________ OFFICE OF THE CLERK

In The

Supreme Court of the United States

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ROBERT N. ANGLETON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

Robert Angleton was indicted under the Texas murder-for-hire statute. This was a capital offense and the state sought the death penalty. A jury acquitted Angleton. More than four years later, after much cooperation between state and federal authorities, the federal government charged Angleton with the same murder. This indictment incorporates the identical state statute that Angleton was exonerated on in state court. Angleton attacked the federal prosecution on double-jeopardy grounds. And the district court found that the state and federal charges were the same offense under *Blockburger*. But both the district court and the Fifth Circuit ultimately relied on the dual-sovereignty doctrine to defeat Angleton's claim. Is Angleton's federal prosecution barred by double jeopardy? This question raises several constitutional issues:

a. Should the dual-sovereignty doctrine be reexamined in light of (i) the Fifth Amendment's incorporation into the Due Process Clause of the Fourteenth Amendment, and (ii) the significantly increased level of federal involvement in state criminal-law matters?

b. Does the incorporation of the Texas capital-murder statute as the central element of a federal murder charge preclude application of the dual-sovereignty doctrine if the defendant has already been tried and acquitted under the Texas statute?

c. Do principles of comity and federalism prevent a federal jury from directly impeaching a state jury's verdict on the same offense?

QUESTIONS PRESENTED – Continued

d. Does the *Bartkus* sham exception to the dual-sovereignty doctrine exist? And if it does, by what criteria is it measured? Once the test is established, it must be decided if it was met here.

PARTIES TO THE PROCEEDING

The parties to the proceeding are the petitioner, Robert Nicholas Angleton, and the respondent, the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Robert Nicholas Angleton respectfully petitions for a writ of certiorari to review the judgment from the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The Fifth Circuit's opinion is published,[1] as is the district court's Memorandum and Opinion.[2] Both are included in the Appendix.

JURISDICTION

The Court of Appeals entered its judgment on December 12, 2002.[3] The mandate issued immediately following the decision.[4]

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Angleton seeks review from a final federal court decision in a criminal case.

CONSTITUTIONAL AMENDMENT INVOLVED

The Fifth Amendment provides that: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; . . . "[5]

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[1] *United States v. Angleton*, 314 F.3d 767 (5th Cir. 2002).

[2] *United States v. Angleton*, 221 F. Supp.2d 696 (S.D. Texas 2002).

[3] Appendix at 1.

[4] *Id.* at 16.

[5] U.S. CONST. amend. V.

STATEMENT OF THE CASE

I. Procedural Background

Angleton was indicted under the Texas capital-murder statute for the murder of his wife, Doris Angleton. He was acquitted following a jury trial.[6]

More than four years later, Angleton was charged in a federal indictment with violations of 18 U.S.C. §§1958(a) and 924(c), again for the murder of his wife.[7] The district court denied Angleton's Motion to Dismiss the Indictment on Double Jeopardy Grounds, but certified the motion as nonfrivolous.[8] The Fifth Circuit Court of Appeals upheld the district court's ruling and denied relief.[9]

II. Summary of Facts

A. The Texas murder-for-hire prosecution

Robert Angleton was a professional bookmaker in Houston, Texas. He was also a confidential informant for local and federal authorities.[10] In April 1997, his wife was murdered.[11] After an extensive investigation, the authorities suspected that both Angleton and his brother Roger were involved in the murder.[12]

In October 1997, a Texas grand jury returned separate indictments against Angleton and his brother for capital murder.[13] Angleton and Roger were arrested, and Angleton was held without bond until his trial over a year later.[14]

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[6] Appendix at 17.

[7] *Id.*

[8] *Id.* at 18.

[9] *Id.* at 15.

[10] *Id.* at 19.

[11] *Id.*

[12] *Id.* at 19.

[13] *See* TEX. PENAL CODE ANN. §19.03 (Vernon 1997).

[14] Appendix at 20.

Roger committed suicide while in jail. He left behind a handwritten note that exonerated Angleton.[15]

Angleton's state trial began in July 1998. At its conclusion, the jury found him "not guilty" of the murder-for-hire charge. This was Harris County's first acquittal in a capital case since the death penalty was reinstated in 1976.[16]

B. The Federal murder-for-hire prosecution

Approximately six months after Angleton's acquittal in state court, FBI Special Agent Cynthia Rosenthal (the wife of Harris County District Attorney Charles Rosenthal) and another FBI agent, launched a federal investigation of Angleton for gambling, money laundering, RICO and tax-evasion violations. This inquiry did not include the murder of Doris Angleton.[17] But the focus changed in April 2000.

The Harris County District Attorney's Office contacted the United States Attorney's Office and requested a federal murder-for-hire investigation.[18] The federal government agreed. An *ad hoc* joint federal-state task force was then formed. Its express purpose was to prosecute Angleton in federal court for the same crime that he had been acquitted of in state court.[19] The three lead Houston Police Department investigators joined the federal prosecution team and were deputized as United States Marshals, although the HPD continued to pay their salaries.[20] The Assistant District Attorneys who tried the state case also "cooperated with and encouraged" the federal investigation.[21] As the federal investigation progressed, *"FBI agents interviewed members of the jury that had acquitted Angleton. [T]his questioning focused on how various pieces of evidence and other trial strategies impacted the jurors' decision to vote not guilty."*[22] Both parties agree that the federal prosecution will rely almost exclusively on the evidence used in the state prosecution.[23]

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[15] Appendix at 20.

[16] *Id*. at 21.

[17] *Id*.

[18] *Id*.

[19] *Id*. at 21-22.

[20] *Id*. at 22.

While the joint probe was pending, a nationally-televised broadcast about Angleton's case criticized both the state prosecution and the federal investigation.[24] Within days of this show, the federal government presented a single summary witness – Special Agent Rosenthal (the District Attorney's wife) – to a second grand jury and obtained a murder indictment against Angleton.

The federal indictment contains three counts. The first count alleges that Angleton conspired to commit murder for hire against "the laws of the State of Texas and the United States," under 18 U.S.C. §1958(a).[25] The second count charges a direct murder-for-hire violation under §1958(a) for the same conduct.[26] The third count contains a derivative complaint alleging that Angleton used a firearm in connection with the murder, in violation of 18 U.S.C. §924(c)(1).[27] The government concedes that these charges – save for the firearms violation – incorporate the same Texas capital murder statute that was litigated in the state indictment. "[T]here is no general federal murder statute and no other applicable federal murder statute."[28] As for the firearms infraction, the government agrees that it cannot proceed if double jeopardy bars counts one and two.[29]

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[21] Appendix at 22.

[22] *Id.* at 22-23 (Emphasis added).

[23] *Id.* at 23.

[24] See *48 Hours: The Bookie's Wife*, 2002 WL 8873785 (CBS television broadcast, Jan. 11, 2002).

[25] Appendix at 23.

[26] *Id.* at 24-25.

[27] *Id.* at 25-26.

After applying *Blockburger*, the district court correctly concluded that the federal indictment charges "the same offense as the Texas capital murder charge for which Angleton was tried and acquitted."[30] But the dual-sovereignty-doctrine prevailed and Angleton's motion to dismiss was denied.[31] The Fifth Circuit upheld this ruling.[32]

III. The Federal Questions Presented

Angleton was acquitted of a state offense that is now incorporated into the federal charge. Does the federal prosecution therefore violate his Fifth Amendment double-jeopardy rights? This question requires a reexamination of the dual-sovereignty doctrine, which has been all-too routinely applied in defeating such challenges. Along with this doctrine comes two notable exceptions.

Where one sovereign derivatively enforces the second sovereign's laws by incorporating its criminal statute as the primary element of the indicted offense, it is not acting *separately* and the doctrine does not apply. In this case, the Texas capital murder statute is incorporated *in haec verba* into the federal charge. So the first exception would seem to apply.

The second exception prohibits state and federal governments from cooperating to the extent that their duality disappears. But does this exception truly exist?

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[28] Appendix at 32, fn. 11.

[29] *Id.* at 31.

[30] *Id.* at 34.

[31] *Id.* at 109.

[32] *Id.* at 15.

The circuits cannot agree. And the lack of objective criteria by which to measure the test contributes to the confusion.

Many changes have occurred since this Court embraced the dual-sovereignty doctrine. The Double Jeopardy Clause has been made applicable to the states. And there has been an ever-increasing federalization of criminal law. A number of courts, and many scholars, believe that these developments have weakened the constitutional foundation of the dual-sovereignty doctrine.

Significant and compelling issues of federalism suggest that the dual-sovereignty doctrine be reexamined and either redefined or clarified. This case presents a highly focused, clear-cut opportunity to do so.

REASONS FOR GRANTING THE PETITION

The federal government has indicted Angleton for the same offense as the state charge, for which he was acquitted following a full and fair jury trial. The federal jury will therefore receive virtually the same instructions as those that were given to the state jury. And little, if any, new evidence will be presented at the second trial. So – in essence – a federal jury will be asked to impeach the state jury's verdict. Two juries cannot be allowed to collide in this fashion.

The abhorrence of being twice tried for the same offense is one of the oldest and most venerable tenets in our legal system. The indictment here can only proceed if the dual-sovereignty doctrine permits the federal government to do what the State of Texas clearly cannot: place Angleton in jeopardy a second time for the same offense. So the question is whether the dual-sovereignty doctrine is still a viable principle.

The dual-sovereignty doctrine is justified historically because the Fifth Amendment was not applicable to the states. Double-jeopardy protections therefore did not constrict state action. But this safeguard's incorporation into the Due Process Clause of the Fourteenth Amendment

– and its resulting applicability to the states – requires a principled reexamination of the dual-sovereignty doctrine. We do know that state and federal sovereigns cannot operate so as to violate an individual's Fourth and Fifth Amendment rights. Surely, then, one cannot be forced to stand trial twice for the same offense. The Double Jeopardy Clause offers at least as much protection as the right to be free from unreasonable searches and seizures, and the right against self-incrimination.

The dual-sovereignty doctrine relies on a rigid adherence to a premise that is no longer tenable: that state and federal prosecutors always pursue different interests as separate and distinct sovereigns. It arose from *dicta* in a series of pre-civil war cases that are relics of a very different time. Then, the federal interest in criminal law was limited to areas of unique national concern implicating the federal government's constitutionally enumerated powers. Now, with the expansion of federal criminal law and the growth of cooperative federalism, state and federal prosecutors more often work together than as the police arms of separate sovereigns.

The dual-sovereignty doctrine has no constitutional, legal, or historic basis other than inertia. The right to a jury verdict's finality is so basic that it is guaranteed in both the body of the Constitution and the Bill of Rights. It is the institution of democracy that cuts closest to the bone and to the actual will of the People. There should be a clear and objective limitation upon prosecutorial authority to bring one jury in conflict with another for the same offense. Yet the dual-sovereignty doctrine overwhelms rational analysis and belittles the finality and dignity of a state jury verdict. Such cannot have been the intent of the People who ratified the concept of federalism.

If dual-sovereignty is to survive the impact of modern times, its limitations must be clearly defined and strictly enforced. This Court has in fact recognized two such exceptions, both of which are applicable here.

Where one sovereign is enforcing the second sovereign's laws by incorporating its criminal statute as the primary element of the indicted offense, it is not acting *separately* and the doctrine does not apply. This principle was articulated in *Houston v. Moore* and was later reiterated in *Bartkus*. In this case, the Texas capital murder statute is incorporated *in haec verba* into the federal charge. So the first exception would seem to apply. But is this Court's opinion in *Houston* controlling? The Fifth Circuit questioned its continued relevance and gave no moment to Angleton's argument.[33] Second, where one sovereign effectively acts for another in bringing a successive prosecution – which the first cannot because of double-jeopardy prohibitions – the duality necessary to apply the doctrine is lost. The record before the district court established a hand-in-glove relationship between the State of Texas and federal prosecutors that requires application of this sham exception. But does such an exception exist? The Fifth Circuit is not entirely sure, even though many other circuits readily agree that it does exist. And if the sham exception does indeed live, how is it to be measured? Some objective criteria are necessary to insure uniform application.

Dual sovereignty cannot stand as the justification for Angleton to again be placed in jeopardy for murder. The state jury's verdict cannot logically be thrown into conflict with a federal jury. This petition should be granted so that these concerns can be addressed. These are important questions of federal law that – in the light of modern times – have not been, but should be, settled by this Court.

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[33] Appendix at 13.

ARGUMENTS SUPPORTING REASONS FOR REVIEW

I. Angleton's Federal Prosecution Violates the Double Jeopardy Clause

The prohibition against being twice tried for the same offense is an ancient restraint on governmental power deeply rooted in our legal history.[34] It developed as a basic notion of fairness with roots traceable to the Hebrew Talmud.[35] The Framers' included the Fifth Amendment's Double Jeopardy Clause in the Bill of Rights because they, too, feared the specter of successive prosecutions.[36]

The first Congress adopted the Double Jeopardy Clause in its present form only after considerable discussion. It was decided that the provisions of the text should mirror the already well-established double-jeopardy principle. The 1789 congressional debate reflects this objective.[37] But the representatives did not initially arrive at this result. They first considered a proposed amendment that would bar double prosecutions for the same offense only if brought under "any law of the United States."[38] The rejection of this limitation indicates that Congress intended to establish a broad national policy against federal courts trying a person after acquittal or conviction in *any other court*. By doing this, Congress sought to maintain society's commitment to the binding effect of a jury's verdict, which is "in the ancient words, the verdict of the country."[39]

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[34] *See* Westin & Deubel, *Toward a General Theory of Double Jeopardy*, 1978 S.Ct.Rev. 81.

[35] *See* Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961).

[36] *See Fox v. Ohio*, 46 U.S. (5 How.) 410, 440 (1847) (McLean, J. dissenting) ("Nothing can be more repugnant or contradicting than two punishments for the same act, it would make a mockery of justice and a reproach to civilization. It would bring our system of Government into merited contempt.")

[37] *See* 1 ANNALS OF CONG. 781 (1789).

[38] *Id.* at 782.

In this case, the federal indictment not only charges Angleton with the same *conduct* for which he was previously tried – and unanimously acquitted by a state jury – but also accuses him under the *same Texas statute*. The government in fact conceded – and the district court found – that the offense in the federal indictment was a state-law murder not cognizable under any federal statute.[40] The §1958 violation therefore depends entirely on the allegation that the murder violated the same Texas capital-murder charge for which Angleton was exonerated.

The district court reached this conclusion after applying the well-known *Blockburger* test.[41] Under this analysis, each of the Texas and federal murder-for-hire charges must contain an element that the other does not to escape the reach of the Double Jeopardy Clause.[42] And as the district court observed, both indictments demand the common elements of: (i) intent, (ii) death, and (iii) commission of murder for remuneration.[43] While the federal indictment also contains conspiracy and interstate travel, there is no element in the Texas statute not required in the federal indictment.[44] The district court therefore correctly concluded that the "offenses charged in Counts One and Two of the indictment are, for *Blockburger* purposes, the same offense as the Texas capital murder charge for which Angleton was tried and acquitted."[45] But the inquiry did not end there.

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[39] *United States v. Cauble*, 706 F.2d 1322, 1356 (5th Cir. 1983).

[40] Appendix at 32, fn. 11, 34.

[41] *Blockburger v. United States*, 284 U.S. 299 (1932).

[42] *See United States v. Sharpe*, 193 F.3d 852, 863 (5th Cir. 1999), *cert. denied*, 528 U.S. 117 (2000).

[43] Appendix at 33.

[44] *See* TEX. PENAL CODE ANN. §19.03 (Vernon 1997) (The Texas muder-for-hire statute includes the common notions of conspiracy).

The district court applied the dual-sovereignty doctrine and found that the federal prosecution could proceed. Angleton's arguments, however, were far from frivolous. So the court stayed the proceeding pending review by the Fifth Circuit.[46]

The Fifth Circuit side-stepped *Blockburger* and proceeded directly to the dual-sovereignty doctrine. Since *Blockburger* was not addressed, it must be assumed that the Court had no quarrel with the lower court's finding that the two offenses were the same for double jeopardy purposes. But bound by this Court's precedent, the Fifth Circuit had no choice but to find against Angleton. In the process, it concluded that "the circumstances of the case are irrelevant."[47] It is this rigid adherence to an out-dated doctrine that restricts an individual's liberty in the most abhorrent of circumstances. The time has come to revisit the issue.

II. The Dual-Sovereignty Doctrine Does Not Apply

A. The history and purpose of the dual-sovereignty doctrine

The first suggestion of a dual-sovereignty doctrine arose when problems were created by the federal power to call forth the militia.[48] The federal government had sole authority to exercise these powers, but the act of calling forth the militia fell upon the states. The defendant in *Houston v. Moore* was fined under a Pennsylvania law penalizing the failure of militia men to respond to such a call. He challenged the statute's constitutionality, arguing that Congress retained exclusive power to regulate the militia.

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[45] Appendix at 34.

[46] *Id.* at 18.

[47] *Id.* at 8, quoting *Heath v. Alabama*, 474 U.S. 82, 92 (1985).

[48] *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).

The Court understood the overlap of jurisdiction between the two sovereigns. And it expressed concern that if the states legislated in areas of federal-enumerated powers, the possibility of being subject to prosecution under two laws for the same matter was "something very much like oppression, if not worse."[49] Given the unique structure of the Pennsylvania statute, the Court held that concurrent jurisdiction of the Pennsylvania Court Martial was not unconstitutional. But the Court cautioned against the double jeopardy hazard that the exercise of concurrent jurisdiction could create.[50]

The Court returned to dual sovereignty thirty years later in two counterfeiting cases.[51] Both *Fox* and *Marigold* recognized that the power to establish and regulate a central currency was vested by the Constitution in the federal government. But the states retained concurrent jurisdiction to punish cheating by passing a false coin. The *Fox* court rejected the argument that a federal prosecution could give rise to double jeopardy concerns if a state sought to punish the same cheat. Relying on *Barron v. City of Baltimore*,[52] the Court found that the Double Jeopardy Clause placed no limits on state-government actions. The Court did, however, indicate that the issue would likely never arise: both sovereigns would normally not seek to punish the same act, except "in instances of peculiar enormity or where the public safety demanded extraordinary rigor."[53] This balancing of federalism concerns illustrates the tensions inherent in concurrent jurisdiction.

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[49] *Houston*, 18 U.S. at 23.

[50] *Id.* at 31.

[51] *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847) and *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850).

[52] *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

[53] *Fox*, 46 U.S. at 435.

The dual-sovereignty doctrine, discussed as theoretical *dicta* in these antebellum opinions, was first squarely confronted in *United States v. Lanza*.[54] This prohibition-era case involved successive prosecutions by both the state and federal governments. The defendants were charged with violating the Volstead Act by manufacturing, transporting, and possessing an intoxicating liquor. They filed a special plea claiming that they had previously been convicted in state court of the same offense under the Washington prohibition statute. The district court sustained the plea because "[i]t seems manifest that it was not the intent that a person should be punished by the state and federal law for the same offense."[55] The government appealed and this Court reversed.

The Court held that under the dual-sovereignty doctrine, successive prosecutions were constitutional. Again borrowing *Barron's* proposition that the Double Jeopardy Clause did not apply to the states, the Court concluded that the defendants committed two different offenses by the same act. A conviction for the state offense was therefore not a conviction of the federal offense. Chief Justice Taft declared that the ban against double jeopardy only applied to "a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority." The *same act* was an offense under both state and federal laws and "[t]he defendants thus committed two different offenses . . . "[56] This reasoning cast a blind eye to the double-jeopardy implications of concurrent jurisdiction (not to mention ignoring the intent of the first Congress). And it did so in an effort to enforce prohibition granted by the second clause of the Eighteenth Amendment, which specifically gave states and the federal government concurrent power to enforce the proscription.[57] But is *Lanza* controlling?

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[54] *United States v. Lanza*, 260 U.S. 377 (1922).

[55] *See United States v. Peterson*, 268 F. 864, 866 (W.D. Wash. 1921).

[56] *Lanza*, 260 U.S. at 382.

It is uncertain whether the state-court charges would satisfy the *Blockburger same-offense* test when compared to the subsequent federal indictment. In reality, *Lanza* is a *same-act* case rather than a *same-offense* case. This explains why it seeks precendential support from the *dicta* in the *same-act* cases of *Fox* and *Marigold*. The *same act* can obviously be criminalized under any number of viable theories. The *same act* can generate a state assault and a federal civil-rights violation. And just as plainly, such cases are not the *same offense*. So *Lanza* may not even be applicable. But if it is, it should be interpreted in light of *Blockburger*, which is the acid test for double-jeopardy analysis. *Same acts* – insofar as *acts* means *conduct* – has not been the standard since this Court's decision in *Dixon*, nearly a decade ago.[58]

Lanza presented a novel situation, indeed. It was the first occasion that the Court faced successive prosecutions as an actual rather than a potential problem. Forced to address the issue directly, the Court chose to establish the dual-sovereignty exception to double jeopardy.

The rule presupposes that the federal and state governments are separate sovereigns protecting distinct interests. It completely disregards the individual's right to avoid successive prosecutions – a protection that in a single jurisdiction is enough to bar such action. Carried to its logical extreme, the rule would permit successive prosecutions in every case involving overlapping federal and state statutes, regardless of whether the context justified dual prosecution. *Lanza* is a striking picture of extant doctrine powerfully pushing in the same direction as the Court's nonprohibition ideological agenda. But when the Eighteenth Amendment collapsed, so did *Lanza*'s rationale. The Court has continued to adhere to the dual-sovereignty exception, notwithstanding. It is a practice that must be reexamined.

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[57] *See* U.S. CONST. amend. XVIII, §2.

[58] *See United States v. Dixon*, 509 U.S. 688 (1993).

The Court did not revisit the dual-sovereignty doctrine until its companion decisions in *Bartkus v. Illinois*[59] and *Abbate v. United States*.[60] In *Bartkus*, the Court held that the Fourteenth Amendment did not bar a state prosecution following a prior federal conviction. And *Abbate* found that the Fifth Amendment did not prevent a federal prosecution following a state trial for the same offense. Both decisions issued on a five-to-four vote. And each again relied on *Barron*. Justice Frankfurter, writing for the five Justices in the majority, embraced the dual-sovereignty doctrine as a necessary corollary to the federal system.

But as Justice Black explained in dissent, the dual-sovereignty doctrine was not imported from English law's double-jeopardy jurisprudence. It was created from whole cloth by *Fox* and *Marigold* to accommodate the then-recognized concept of coexisting sovereigns in the American federal system. This view of federalism was premised on *Barron's* holding that "the Due Process Clause of the Fourteenth Amendment does not apply to the states any of the provisions of the first eight amendments . . . "[61] Dual-sovereignty dogma is in fact contrary to millennia of jurisprudence. "Even in the Dark Ages, when so many other principles were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of early Christian writers."[62]

Bartkus does not pivot on dual sovereignty. It turns on whether the Fourteenth Amendment applies the Bill of

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[59] *Bartkus v. Illinois*, 359 U.S. 121 (1959).

[60] *Abbate v. United States*, 359 U.S. 187 (1959).

[61] *Bartkus*, 359 U.S. at 124.

[62] *Id.* at 151-152 (Black, J., dissenting).

Rights to the states. It cannot be determined whether it is a *same-act* or a *same-offense* situation. It is the last successful rear-guard action fought in defense of *Palko's* nonincorporation.[63] But when *Palko* fell, *Bartkus* was left with both flanks exposed.

The dual-sovereignty doctrine has two bases: (i) the Fifth Amendment's Double Jeopardy Clause did not apply to the states, and (ii) federalism required the separation of federal and state law enforcement in areas where constitutionally enumerated federal responsibility overlapped with areas that were traditionally reserved to the states. Both premises are now false. And a new decisional matrix controls.

B. Double-jeopardy protections apply to the states

Central to *Bartkus* and *Lanza's* reliance on dual sovereignty was *Barron's* determination that the Fifth Amendment's Double Jeopardy Clause did not apply to the states. A state could try a defendant for the same offense more than once. Thus, there was no justification for the federal government *not* to try a defendant after the state had already done so. But the application of the Fifth Amendment's Double Jeopardy Clause to the states has eroded this logic.

The states were bound by the Double Jeopardy Clause ten years after *Bartkus.* In a series of cases, the Court found that the protections in the Bill of Rights were applicable to the states through the Due Process Clause of the Fourteenth Amendment.[64] This incorporation required

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[63] *Palko v. Connecticut*, 302 U.S. 319 (1937).

[64] *See Benton v. Maryland*, 395 U.S. 784 (1969). *See also Wolf v. Colorado*, 338 U.S. 25 (1949) (Fourth Amendment prohibition against unreasonable searches and seizures applicable to states); *Malloy v.*

(Continued on following page)

the Court to reconsider a number of its earlier rulings that were based on the assumption that the states were not constrained by the first eight amendments.

For example, in *Elkins v. United States*,[65] the so-called *silver-platter doctrine* was overruled. Echoing Justice Black's dissents in *Bartkus* and *Abbate*, the Court reasoned that evidence seized illegally by one sovereign could not be turned over to another sovereign: "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer."[66] And in *Murphy v. Waterfront Comm'n*, the Court completely discarded the separate-sovereignty theory of self-incrimination.[67] In light of *Malloy v. Hogan*,[68] "there is no continuing legal vitality to, or historical justification for, the rule that one jurisdiction . . . may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction."[69] The policies behind the privilege would be frustrated by the dual-sovereignty doctrine, which allowed a defendant to be "whipsawed into incriminating himself under both state and federal law even though the constitutional privilege against self-incrimination applied to each."[70] Justice Harlan later described *Murphy* as having "abolished the two sovereignties rule."[71]

Hogan, 378 U.S. 1 (1964) (Fifth Amendment right against self-incrimination applicable to states).

[65] *Elkins v. United States*, 364 U.S. 206, 208 (1960).

[66] *Id.* at 215.

[67] *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

[68] *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment right against self-incrimination is applicable to the states).

[69] *Murphy*, 378 U.S. at 77.

[70] *Id.* at 55, quoting *Knapp v. Schweitzer*, 357 U.S. 371, 385 (1958) (Black, J., dissenting).

[71] *Stevens v. Marks*, 383 U.S. 234, 250 (1966) (Harlan, J., concurring in part and dissenting in part).

Unlike these areas, however, there was no thoughtful reexamination of the Fifth Amendment's double-jeopardy protection. The Court has not explored the impact of *Elkins* and *Murphy* on the dual-sovereignty doctrine. This silence is deafening when compared to its approach in these incorporation cases.

It is indeed true that the Court reaffirmed the dual-sovereignty doctrine in *Heath v. Alabama.*[72] And it relied on *Lanza*, *Bartkus* and *Abbate* to do so. But the Court completely failed to address the effect of its decisions in *Elkins*, *Malloy*, *Murphy* and *Benton*. Though in the final analysis, *Heath* involved two states' successive prosecutions for the same offense. It therefore did not raise the federalism concerns that have called the dual-sovereignty exception into question.

To date, this Court has not decided whether its application of the Fourteenth Amendment to the Bill of Rights changed or modified the dual-sovereignty rule. "[T]he Court never chose to build on *Benton's* incorporation of the Double Jeopardy Clause to overrule *Bartkus* and *Abbate*. *The Court has never explained – or even focused on – this anomaly.*"[73] But it clearly should. "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts."[74] *Benton* specifically overruled *Palko*, which provided the *Bartkus* Court its rationale for dual sovereignty. It is time for these decisions to be reconciled.

The call for a contemporary probe of the dual-sovereignty doctrine is not limited to academics.[75] In

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[72] *Heath v. Alabama*, 474 U.S. 82 (1985).

[73] Akhil Reed Amar and Johnathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 15 (1995) (emphasis added).

[74] *Elkins*, 364 U.S. at 221.

[75] *See* Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1 (1992); Sandra Guerra, *The Myth of Dual*

(Continued on following page)

United States v. Grimes, the Third Circuit expressed concern that *Bartkus* may no longer be viable. "[T]he recent expansion of federal criminal law jurisdiction magnifies the impact of *Bartkus* and *Abbate*, thus rendering a reassessment of those decisions timely from a practical standpoint as well."[76]

The case at hand demonstrates the ills that befall the federalization of traditional state crime: the federal and state governments are trying to do together what neither could constitutionally do alone. A trial on this indictment should not proceed without first revisiting *Bartkus*, and deciding if the dual-sovereignty exception has survived *Benton* and *Malloy*.

Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy, 73 N.C. L. Rev. 1159 (1995); Walter T. Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. Chi. L. Rev. 591 (1961); J.A.C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309 (1932); Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306 (1963); Evan Tsen Lee, *The Dual Sovereignty Exception to Double Jeopardy; In the Wake of Garcia v. San Antonio Metropolitan Transit Authority*, 22 New Eng. L. Rev. 31 (1987); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. Rev. L. & Soc. Change 383 (1986); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecution: A Suggested Solution*, 34 S. Cal. L. Rev. 22 (1961); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 Case W. Res. L. Rev. 700 (1963); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 Yale L.J. 281 (1992); James E. King, Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 Stan. L. Rev. 277 (1979); Note, *Double Jeopardy and Federal Prosecution After State's Jury Acquittal*, 80 Mich. L. Rev. 1073 (1982); Note, *Double Prosecution by State and Federal Governments: Another Exercise in Federalism*, 80 Harv. L. Rev. 1538 (1967).

[76] *United States v. Grimes*, 641 F.2d 96, 101 (3d Cir. 1981).

C. Dual sovereignty and cooperative federalism

In *Heath*, this Court held that the dual-sovereignty doctrine is founded on the common-law concept of crime as an offense against the sovereign.[77] And it turns on whether the authorities initiating the prosecutions derive their power to punish from distinct power sources. The only plausible explanation for the continued existence of the dual-sovereignty doctrine is the now out-dated notion that Congress did not intend for local, state and federal law enforcement authorities to cooperate in a national law-enforcement agenda. The decisions in *Elkins* and *Murphy* reflect this thinking. The Court has not allowed state and federal agencies, working together, to violate fundamental rights protected by the Fourth and Fifth Amendments.

The dual-sovereignty doctrine was fashioned in an age when the states and the federal government acted as two separate sovereigns pursuing independent criminal-law interests. The vitality of the rule rests on the traditional view that governmental agencies function separately. Each has a different focus and agenda in law enforcement. The doctrine also reflects the strong judicial policy against federal interference with state criminal proceedings.[78] But the rise of cooperative federalism has seen federal interests emerge as a dominant force in crime control, thus eroding the justification for such a principle.

Since *Bartkus*, the degree of coordination between state and federal authorities has vastly increased. Particular areas of law enforcement have assumed importance as part of a national law-enforcement policy. The creation of the national *drug czar* and declaring a *war on drugs* is but one example. Narcotics enforcement has thus been elevated to a level of national concern. Technological developments also encourage increased interaction between state and federal authorities, allowing them to share databases and forensics laboratories. Financial constraints obviously encourage this increased collaboration.

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[77] *Heath*, 474 U.S. at 89.

[78] *Arizona v. Manypenny*, 451 U.S. 232 (1981).

Over 38 years ago, the Court acknowledged the problem of implementing dual sovereignty in "our age of 'cooperative federalism,' where the federal and state governments are waging a united front against many types of criminal activity."[79] In the years since, joint efforts between state and local authorities has increased exponentially, fueled by Congressional expansion of federal law into state-enforcement areas. Recently, an American Bar Association task force concluded that "a complex layer is being added to the overall criminal justice scheme, dramatically superimposing federal crimes on essentially localized conduct already criminalized by the states."[80] The task force emphasized the rate of increase with the extraordinary fact that "[*m*]*ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970*."[81] With this changing landscape, courts have approved of the need for increasing coordination and cooperation between federal and state agencies.[82]

This collaboration is authorized by statute. The Controlled Substances Act of 1970 provides that the Attorney General shall cooperate with local, state and federal agencies in suppressing the trafficking and abuse of controlled substances.[83] Title 21 authorizes the Attorney

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[79] *Murphy*, 378 U.S. at 55-56.

[80] James A. Strazzella, Task Force on Federalization of Criminal Law, 1998 A.B.A. Crim. Just. Sec. 18.

[81] *Id.* at 7 (emphasis in original).

[82] *See United States v. Davis*, 906 F.2d 829, 831 (2d Cir. 1990) ("cooperation between federal and local agencies has become increasingly important and increasingly commonplace"); *United States v. Jordan*, 870 F.2d 1310, 1313 (7th Cir. 1989) (finding nothing more than "commendable cooperation between state and federal law enforcement officials"); *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 77, n.351 (1992).

[83] Pub.L.91-513, 84 Stat. 12141 (1970).

General to transfer forfeited property to any federal, state, or local agency that participated directly in the seizure or forfeiture of the property.[84] Congress intends for state and federal law enforcement to function as a unit, bound together by information, technology, financial incentives, contractual arrangement, and statutory mandate.

Similarly – and especially relevant here – Congress has authorized federal authorities to prosecute criminal offenses that are normally perceived as common street crimes. This federalization of state crimes reveals a desire to assist local government in protecting the people. It also reflects an understanding that the most should be made from law enforcement's limited assets. Based on the federal government's need to assist local authorities in combating organized crime, Congress adopted the Comprehensive Crime Control Act of 1984. This Act federalized offenses that were traditionally enforced by state officials and expanded the roles of joint-jurisdictional task forces. The Act included §1958.

By enacting §1958, Congress authorized federal authorities to prosecute an individual by embracing state law violations as a basis for the federal charge. Its intent was to create a means for the federal government to continue its "war" against organized crime. But Congress had no wish that the murder-for-hire statute replace local prosecutions. It was merely anticipated that the federal government would assist state authorities and that the two would join together to enforce transgressions. Thus, the cooperation between state and federal authorities should "be utilized to ensure that the new murder-for-hire statute is used . . . to assist the States rather than to allow the usurpation . . . by Federal authorities . . . "[85] So only a single prosecution should result from the combined resources of state and federal law enforcement. Multiple state and federal indictments for the same offense was never envisioned when §1958 was enacted.

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[84] 21 U.S.C. §873.

[85] U.S. Code and Congressional News, 98th Congress, PL. 98-473, Title X – Part A, p. 3484.

In *United States v. G.P.S. Auto. Corp.*, the Second Circuit perceived the paradox of encouraging combined efforts between federal and state enforcement agencies while upholding the dual-sovereignty doctrine.[86] The extent of this cooperation "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other."[87]

In the age of joint task forces, shared resources, combined training and seconded personnel, dual sovereignty is a fiction. Today, state and federal law enforcement more often work as partners than as separate sovereigns. The concept of dual sovereignty – if it is to be maintained – must reflect the changing nature of this cooperation. The Court prohibited state and local governments from profiting when their teamwork violated individual rights protected by the Fourth and Fifth Amendments. Now, Congressionally mandated cooperation should be prohibited if it results in multiple prosecutions for the same offense. Effect should be given to the Double Jeopardy Clause and the fundamental right that it seeks to safeguard.

D. When the state and federal governments are not acting as separate sovereigns

1. The *Bartkus* exceptions

Even if the dual-sovereignty doctrine is alive, *Bartkus* defined two classes of successive prosecutions where the sovereigns have no separate interests, and thus no duality for double jeopardy purposes. These exceptions apply when (i) one sovereign is derivatively enforcing a statute of the other by explicitly incorporating it as a central element of an offense,[88] or (ii) one sovereign attempts to use the judicial machinery of the other to bring a prosecution that is really a *sham* or *cover* for a second prosecution that it cannot bring on its own.[89] Angleton's federal prosecution falls into both of these categories.

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[86] *United States v. G.P.S. Auto. Corp.*, 66 F.3d 483 (2d Cir. 1995).

[87] *G.P.S. Auto. Corp.*, 66 F.3d at 499.

a. Enforcing the second sovereign's statute

In *Houston*, the Court confronted a Pennsylvania statute that "confer[red] authority upon a State Court Martial to enforce the laws of the United States against delinquent militia men, who had disobeyed the call of the President to enter into the service of the United States."[90] If this occurred, "the sentence of either Court [state or federal], either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a Circuit Court of the United States."[91] *Bartkus* specifically embraced this exception to the dual-sovereignty doctrine. It held that "[*Houston v. Moore*] can be cited . . . for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question."[92] The Court reached the same result in *United States v. Mason*,[93] albeit for different reasons.

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[88] *Bartkus*, 359 U.S. at 129-30.

[89] *Bartkus*, *id.* at 123.

[90] *Houston*, 18 U.S. at 28.

[91] *Id.* at 31.

[92] *Bartkus*, 359 U.S. at 129-30.

[93] *United States v. Mason*, 213 U.S. 115 (1909).

Mason addressed an earlier version of 18 U.S.C. §§241-42, which prohibited the same civil-rights violations as the current statute, except that it contained a sentencing enhancement (former §5509). This enhancement applied if "any other felony or misdemeanor" was committed during the course of the conduct. The sentence would then be the same "as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed."[94]

The defendants were acquitted of murder by a Colorado state jury.[95] The federal government subsequently prosecuted them for the same murder under §§5508 and 5509. The Court found that the §5508 infraction was an offense against the laws of the United States, but the incorporated murder was "a distinct offense, a crime only against the state. . . . "[96] The Court *unanimously* agreed that the federal court was bound to accept the state-court acquittal.[97]

Mason's importance cannot be overstated. Where one sovereign's statute is incorporated into another sovereign's criminal law, an acquittal acts as a bar to the relitigation of the same conduct by the second sovereign. This was exactly the outcome in *Houston*. And it is the only reasoned result here.

It is indeed true that under the RICO statute[98] and the Travel Act,[99] previously acquitted state offenses may be used as predicate acts without violating double jeopardy. But those statutes merely incorporate state-law offenses as subsidiary elements of significantly larger criminal schemes. They are not the central elements of the federal offense.

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[94] *Mason*, 213 U.S. at 119.

[95] *Mason*, *id.* at 119-21.

[96] *Id.* at 124.

[97] *Id.*

[98] 18 U.S.C. §1961.

[99] 18 U.S.C. §1952.

For example, racketeering activity conducted by an ongoing enterprise is the *gravamen* of RICO. The individual predicate crimes serve only to establish the necessary *pattern*. So there is no double-jeopardy violation in a RICO case that is based in part on previously acquitted state-law crimes.[100] Unlike the statute in *Mason*, RICO's reference to state law is merely *definitional*.[101] Similarly, "proof of the violation of the state statute to which reference is made for purposes of prosecution under [the Travel Act] is not an essential element to be proved in such a federal prosecution. State law thus serves merely a definitional purpose."[102]

By contrast, in this case, as in *Houston* and *Mason*, the incorporated state statute *is* the heart of the pending federal indictment. The Texas capital murder statute is incorporated wholesale into the federal murder-for-hire charge. There simply is no crime without the state offense. Angleton's prosecution therefore violates the Fifth Amendment's Double Jeopardy Clause.

b. The sham exception

The second *Bartkus* exception recognized the possibility that one sovereign – in bringing a successive prosecution – can effectively act for the first and thereby destroy the duality necessary for the dual-sovereignty doctrine. The *Bartkus* Court found that the record before it did not support the conclusion that the state "was merely a tool of the federal authorities," or that the "state prosecution was a sham and a cover for a federal prosecution." But it did indicate that such a sham could occur.[103] Although the Fifth Circuit is not quite sure.

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[100] *See United States v. Frumento*, 563 F.2d 1083, 1087-88 (3d Cir. 1977).

[101] *Id. See also, United States v. Licavoli*, 725 F.2d 1040, 1047 (6th Cir. 1984).

[102] *United States v. Cerone*, 452 F.2d 274, 286 (7th Cir. 1971) (citations omitted).

Some panels have expressed uncertainty over whether the *Bartkus* sham exception is mere *dicta*.[104] Others have assumed that the exception exists.[105] And in this case, the court decided that *Bartkus'* failure to "identify a particular instance of a sham prosecution may mean that the exception does not exist."[106] This is a curious conclusion. At least seven other circuits have found the question uncontroversial: the sham exception does exist.[107]

Relief has never been granted under the sham exception. And that may be because – as was the case here – courts apply a single-factor test: "whether the separate sovereigns have made independent decisions to prosecute . . . "[108] The court failed to recognize that the boundaries of a *Bartkus* sham extend beyond a lack of independent volition.

Angleton established more than a *prima facie* case that federal and state authorities colluded beyond the norms of cooperation between law enforcement agencies.

- The joint federal-state task force was formed at the instigation of the state authorities for the express purpose of reprosecuting Angleton.[109]

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[103] *Bartkus*, 359 U.S. at 123-24.

[104] *United States v. Patterson*, 809 F.2d 244, 247 n.2 (5th Cir. 1987).

[105] *See United States v. Moore*, 958 F.2d 646, 650 (5thCir. 1992) and *United States v. Logan*, 949 F.2d 1370, 1380 n.16 (5th Cir. 1991).

[106] Appendix at 10.

[107] *See United States v. Guzman*, 85 F.3d 823, 827 (1st Cir. 1996); *G.P.S. Auto. Corp.*, 66 F.3d at 496; *In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990); *United States v. Bernhardt* 831 F.2d 181, 183 (9th Cir. 1987); *United States v. Moore*, 822 F.2d 35, 38 (8th Cir. 1987); *United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979); *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976).

[108] Appendix at 11.

[109] *Id.* at 56, 57.

- Before the state acquittal, the federal government demonstrated no interest in prosecuting Angleton for murder, despite the case's notoriety and its awareness of interstate travel.[110]
- The federal government did not investigate the murder charges until after state authorities asked the federal prosecutor to extend its investigation beyond the matters of federal interest that it was then considering.[111]
- Evidence of gambling, money laundering, RICO and tax violations was presented to the first federal grand jury, which failed to return any charges. The case was then presented to a new grand jury where the only witness was FBI Agent Cynthia Rosenthal. That grand jury indicted on the murder-for-hire charges. Virtually all of the evidence for that accusation came from the state proceeding.[112]
- After the state acquittal, the state officials at the center of both investigations were deputized as United States Marshals to assist the federal government in its reprosecution. Their salaries continue to be paid by the Houston Police Department. The state investigators and the FBI agent-in-charge have close ties to the Harris County District Attorney's office. Special Agent Rosenthal is the wife of Charles A. Rosenthal, Jr., who was the felony-division chief of the Harris County District Attorney's Office that prosecuted Angleton.[113]

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[110] Appendix at 56, 57.

[111] *Id.*

[112] *Id.* at 58.

[113] *Id.* at 57.

- "The three and one-half years that elapsed between the state acquittal and the federal indictment points to a lack of independent federal interest."[114]
- "The state prosecutors have provided the federal investigators and prosecutors with full access to all the information and evidence developed for the state prosecution . . . the investigation by the joint task force has yielded very little new evidence."[115]
- "The federal authorities interviewed the jurors from the state trial in efforts to improve their prosecutorial strategy for this second prosecution."[116]

No reported case contains the breadth or depth of these facts. The few cases with facts approaching this level of collusion have all refused to apply the dual-sovereignty exception.[117]

The problem in this area is two-fold. First, it is not known if there truly is a *Bartkus* sham exception. Second, if there is, what criteria establish its existence. The subjective intent of a prosecutor is surely unworkable as a test for it is oftentimes impossible to prove. If the dual-sovereignty doctrine is to survive, the *Bartkus* sham exception must be validated, and it must be given some teeth. And only an objective calculus will suffice.

This Court should grant review so that it can settle these questions. Many cases have risen – and more are bound to come – in which these issues are prevalent themes. Such is the state of affairs in our rampant era of cooperative federalism.

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[114] Appendix at 57.

[115] *Id.*

[116] *Id.* at 57.

[117] *See United States v. Belcher*, 762 F. Supp. 666, 670-71 (W.D. Va 1991); *G.P.S. Auto. Corp.*, 66 F.3d at 495-96; *Bernhardt*, 831 F.2d at 183.

CONCLUSION

The petition for a writ of certiorari should be granted.

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REVISED DECEMBER 13, 2002

In the

United States Court of Appeals for the Fifth Circuit

No 02-20887

UNITED STATES OF AMERICA

Plaintiff-Apellee,

VERSUS

ROBERT NICHOLAS ANGLETON,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

December 12, 2002

Before SMITH, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Robert Angleton was acquitted, in state court, of the murder of his wife. A federal grand jury then indicted him for the same murder. Angleton appeals, on grounds of double jeopardy, the denial of his motion to dismiss the indictment. Concluding that the dual sovereignty doctrine permits a successive prosecution, we affirm.

I.

In April 1997, Doris Angleton was shot to death in her Houston home. At the time, she was seeking a divorce from her husband, Robert Angleton, a local bookmaker and police informant.

An investigation led police to suspect that Roger Angleton, Robert's brother, was involved. Police developed evidence showing that shortly before the murder, Roger had traveled from his home in San Diego, California, to Houston, where he used various aliases to register in different hotel rooms and rent two cars. A few days after the murder, he abandoned a suitcase containing two guns at an airport security checkpoint. He was arrested in Las Vegas, Nevada, on unrelated California warrants.

Both brothers were held on suspicion of the murder, and in October 1997 a Texas grand jury returned separate indictments against the two for capital murder. The indictments alleged that Robert had promised to pay Roger money in exchange for Doris's murder. While awaiting trial in jail, Roger committed suicide, leaving behind a handwritten note professing that he alone was responsible for the murder.

A state petit jury acquitted Robert Angleton of capital murder. Six months later, FBI agents began investigating him for separate offenses stemming from his bookmaking activities, including tax evasion. The Harris County District Attorney's Office then contacted the United States Attorney's Office, requesting that it expand the investigation to include Doris's murder.

A joint task force of FBI agents and Houston Police Department ("HPD") officers was formed to investigate the murder. The task force received all the information and evidence previously gathered for the state prosecution. The three lead HPD investigators were deputized as United States Marshals, still on the city payroll, so they would have access to files. The two assistant district attorneys who prosecuted Angleton in the state trial also assisted the task force. As part of the investigation, FBI agents interviewed members of the jury that had acquitted Angleton.[1]

In January 2002, a federal grand jury indicted Angleton on three counts. In counts 1 and 2, the indictment charges Angleton with murder for hire and conspiracy to commit murder for hire, both in violation of 18 U.S.C. § 1958(a), which prohibits interstate travel or the use of instrumentalities of interstate commerce "with intent that a murder be committed in violation of the laws of any State" in exchange for consideration. Count 3 charges Angleton with using a firearm in connection with a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A).

After an evidentiary hearing, the district court found Angleton unable to establish a *prima facie* case of double jeopardy and denied his motion to dismiss the indictment. *United States v. Angleton,* 221 F. Supp. 2d 696 (S.D. Tex. 2002). After determining, however, that Angleton's arguments are not frivolous, the court stayed its proceeding pending the outcome of this interlocutory appeal. We have jurisdiction over an appeal, on nonfrivolous grounds of double jeopardy, of an order denying a motion to dismiss an indictment. *Abney v. United States,* 431 U.S. 651, 657-62 (1977).

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[1] The joint task force has received one piece of new evidence, a tape recording of an interview Angleton gave to a writer, Vanessa Leggett. In addition, federal investigators contend that they have enhanced the quality of a surveillance tape of Angleton that was used at the state trial.

II.

No person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. Double jeopardy concerns are implicated where a defendant is retried for the same offense following acquittal. *Illinois v. Vitale,* 447 U.S. 410, 413-15 (1980). Determining whether two offenses are the same offense for purposes of the Double Jeopardy Clause focuses on their statutory elements. We need not decide, however, whether the federal prosecution of Angleton constitutes double jeopardy, because we conclude that no exception to the dual sovereignty doctrine applies to this case in such a way as to call the federal indictment into question.[2]

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[2] *See, e.g., United States v. Basile,* 109 F.3d 1304 (8th Cir. 1997) (holding that the dual sovereignty doctrine permits a successive federal prosecution after a state acquittal, without addressing whether the underlying state murder charge and § 1958(a) constitute the same offense for purposes of double jeopardy); *United States v. Koon,* 34 F.3d 1416 (9th Cir. 1994) (applying dual sovereignty doctrine without addressing whether state charges of assault with a deadly weapon and excessive use of force by a police officer were the same offenses, for double jeopardy purposes, as the deprivation of constitutional rights, 18 U.S.C. § 242).

III.

The dual sovereignty doctrine permits the United States to "prosecute a defendant after an unsuccessful state prosecution based on the same conduct, even if the elements of the state and federal offenses are identical."[3] Angleton nevertheless argues that the dual sovereignty doctrine "relies on a rigid adherence to a premise that is no longer tenable: that state and federal prosecutors always pursue different interests as separate and distinct sovereigns." He contends that the rise of cooperative federalism and the incorporation of the Double Jeopardy Clause through the Fourteenth Amendment have eroded the foundations of the dual sovereignty doctrine.

A.

The dual sovereignty doctrine derives from the common law notion that a crime is an offense against the sovereign.[4] "When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offenses.'" *Heath,* 474 U.S. at 87. As a sovereign,[5] the United States "has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the federal government." *Id.* at 93. The dual sovereignty doctrine is best understood, then, *not* as an exception to double jeopardy, but rather as a manifestation of the maxim that where a defendant violates the laws of two sovereigns, he commits separate offenses.[6]

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[3] *United States v. Avants,* 278 F.3d 510, 516 (5th Cir.) (citing *Heath v. Alabama,* 474 U.S. 82, 93 (1985)), *cert. denied,* 122 S.Ct. 2683 (2002).

[4] Note, Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, 102 YALE L.J. 281, 290 (1992).

[5] *See McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 410 (1819) ("[In] America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.").

The Supreme Court directly embraced the doctrine for the first time in *United States v. Lanza,* 260 U.S. 377, 382, recognizing that "in determining what shall be an offense against its peace and dignity [, each sovereign] is exercising its own sovereignty, not that of the other." *Id.* at 382. Before *Lanza* was decided, several nineteenth century opinions illustrated that even before the rise of modern "cooperative federalism," *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 55 (1964), there was concurrent regulation.[7] Until *Lanza,* however, the Court was faced only with *threats* of successive state-federal prosecutions.

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[6] *See Heath,* 474 U.S. at 92 ("This Court has plainly and repeatedly stated that two identical offenses are *not* the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns."); *United States v. Lanza,* 260 U.S. 377, 382 (1922) ("[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."); *Moore v. Illinois,* 55 U.S. (14 How.) 13, 20 (1852) ("The same act may be an offence or transgression of the laws of [Illinois and the United States]. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted.").

[7] *See Moore v. Illinois,* 55 U.S. (14 How.) 13 (1852); *United States v. Marigold,* 50 U.S. (9 How.) 560 (1850) (discussing the concurrent power of the federal and state governments to punish counterfeiting); *Fox v. Ohio,* 46 U.S. (5 How.) 410 (1847) (same); *Houston v. Moore,* 18 U.S. (5 Wheat.) 1 (1820) (addressing state statute that punished militiamen who failed to answer the President's call to service).

Two 1959 Supreme Court decisions bolstered *Lanza* and helped shape the modern view of the dual sovereignty doctrine as a mainstay of federalism. In *Bartkus v. Illinois*, 359 U.S. 121 (1959), the Court decided that a successive state robbery prosecution following an acquittal under the federal robbery statute did not deny due process. Key to the decision was the inapplicability of the Fifth Amendment to the states, *id.* at 123-29, a point reiterated in another decision decided the same day, *Abbate v. United States*, 359 U.S. 187, 194 (1959).[8]

In *Heath*,[9] 474 U.S. at 88, the Court recognized that in assessing the validity of the dual sovereignty doctrine, the "crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns." Where the dual sovereignty doctrine has been found inapplicable, it is because "the two prosecuting entities did not derive their powers to prosecute from independent sources of authority."[10] *Id.* at 90. The *Heath* Court explicitly rejected the notion that applicability of the dual sovereignty doctrine should hinge on an assessment of the separate sovereigns' interests. *Id.* at 92. Rather, if the prosecuting sovereigns are separate, "the circumstances of the case are irrelevant." *Id.*

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[8] *Abbate*, 359 U.S. at 188-89, upheld a successive federal prosecution for the destruction of property where defendants had been acquitted in state court. The *Abbate* Court explicitly refused to overrule *Lanza*. *Id.* at 195.

[9] *Heath* applied the dual sovereignty doctrine to a case involving successive prosecutions by two states. There is no authority suggesting that its holding is less relevant in other contexts, such as successive state-federal prosecutions.

[10] For example, successive prosecutions by federal and territorial courts are barred, *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264 (1937), as are successive prosecutions by municipalities that derive their power to try defendants "from the same organic law that empowers the State." *Waller v. Florida*, 397 U.S. 387 (1970).

B.

Angleton points out that, since *Lanza* was decided, the United States has assumed an increased role in the enforcement of criminal law. The dual sovereignty doctrine, however, has never required that where there is concurrent regulation, the United States or a state must demonstrate a unique interest not shared by the other. *Heath,* 474 U.S. at 92.

Angleton also accurately observes that *Bartkus* and *Lanza* were decided before the Double Jeopardy Clause was first applied to the states in *Benton v. Maryland,* 395 U.S. 784 (1969). The legal foundations of the dual sovereignty doctrine, however, have been firmly rooted in the notion that "[t]he same act may be an offence [*sic*] or transgression of the laws" of two separate sovereigns. *Bartkus,* 359 U.S. at 131 (quoting *Moore,* 55 U.S. (14 How.) at 20).

Angleton's argument – that incorporation of the Fourth and Fifth Amendments has led the Court to reconsider the constitutionality of other previously authorized practices in which cooperating state and federal prosecutors accomplished what the federal government was unable to do independently – is unavailing. Angleton cites the overruling, in *Elkins v. United States,* 364 U.S. 206 (1960), of the "silver platter doctrine," a practice that, before the incorporation of the Fourth Amendment, permitted federal authorities to use evidence obtained illegally by state authorities. In *Elkins,* the Court reasoned that evidence seized illegally by one sovereign could not be turned over to another sovereign, because "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215.[11]

The dual sovereignty doctrine, however, exists independently of any interaction between sovereigns; either may prosecute independently to vindicate its own interests. The Supreme Court has said, as recently as *Heath,* that the doctrine remains good law.[12] We therefore turn to Angleton's argument that a successive federal prosecution is barred by exceptions to the dual sovereignty doctrine.

IV.

Angleton contends that two exceptions to the dual sovereignty doctrine bar his federal prosecution. He first argues that the nature and extent of the state officials' involvement in his federal indictment justify application of the "sham prosecution" exception. Second, relying on language in *Houston v. Moore,* 18 U.S. (5 Wheat.) 1 (1820), he contends that the federal murder for hire statute's incorporation of the Texas capital murder statute leaves his prosecution without an independent federal interest.

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[11] *See also Murphy,* 378 U.S. at 77 (overturning the previously authorized rule that, before incorporation of the Self-incrimination Clause of the Fifth Amendment, compelled self-incrimination could be used by a sovereign different from the one obtaining the confession).

[12] *See United States v. Singleton,* 16 F.3d 1419, 1429 n.48 (5th Cir. 1994) ("Even if the constitutionality of the 'dual sovereignty doctrine' were properly before us . . . we are bound by Supreme Court precedent upholding the doctrine." (citing *Heath,* 474 U.S. 82 (1985))).

A.

In *Bartkus,* 359 U.S. at 123-24, the Court suggested, in *dictum,* that there is an exception to the dual sovereignty doctrine where prosecution by one sovereign is used as a cover or tool for a successive prosecution by another sovereign. In such a case, collusion between federal and state officials might blur their distinction such that the defendant is "effectively prosecuted twice by the same sovereign." *United States v. Harrison,* 918 F.2d 469, 474 (5th Cir. 1990).

The *Bartkus* Court's failure to identify a particular instance of a sham prosecution may mean that the exception does not exist. *Id.; United States v. Patterson,* 809 F.2d 244, 247 n.2 (5th Cir. 1987). Indeed, the close interaction between federal and state authorities in *Bartkus,* which included the federal prosecutor's decision to "instigate and guide" the successive state prosecution, suggests that the sham exception exists, if at all, only in the rarest of circumstances. *Bartkus,* 359 U.S. at 165 (Brennan, J., dissenting).[13] In cases in which we have recognized the exception as a possible bar to a successive prosecution, we have never found sufficient collusion to justify its application.[14]

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[13] *See United States v. Figueroa-Soto,* 938 F.2d 1015, 1019 (9th Cir. 1991) ("As a practical matter, . . . under the criteria established by *Bartkus* itself it is extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham or a cover for the other government.").

[14] *See, e.g., United States v. McKinney,* 53 F.3d 664, 676 (5th Cir. 1995) (rejecting claim that state authorities purposely failed to include charges later reported to federal prosecutors); *United States v. Moore,* 958 F.2d 646, 650 (rejecting claim that successive prosecution was a

(Continued on following page)

For evidence that the federal prosecution is a sham, Angleton points to the involvement of state authorities in the process leading to the federal indictment. He argues that the federal government's failure to investigate the murder until contacted by the Harris County District Attorney, and the three and one-half year gap between the state acquittal and federal indictment, demonstrate a lack of federal interest. In addition, Angleton claims that the formation of a joint federal-state task force, the deputizing of HPD officers as U.S. Marshals, and the interviewing of state jurors suggest that the federal prosecution is merely an avenue for the state to retry the case.

The key, however, is whether the separate sovereigns have made independent decisions to prosecute,[15] or whether, instead, "one sovereign has essentially manipulated another sovereign into prosecuting," *United States v. G.P.S. Auto. Corp.*, 66 F.3d 483, 495 (2d Cir. 1995), or because the state and federal prosecutor are the same person, *United States v. Belcher*, 762 F.Supp. 666, 671 (W.D. Va. 1991). The facts of *Bartkus* demonstrate that the degree of cooperation between

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sham where defendant had committed separate offenses against a federal and state officer); *United States v. Cooper*, 949 F.2d 737, 750-51 (5th Cir. 1991) (finding no sham prosecution where there was a short time between a mistaken release from state custody and a federal indictment).

[15] *See United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1361 (11th Cir. 1994) ("To fit within the [sham prosecution] exception, the defendant must show that one sovereign was so dominated, controlled, or manipulated by the actions of the other that it did not act of its own volition."); *In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990) (stating that the sham prosecution exception "may only be established by proof that State officials had little or no independent volition in their proceedings") (citation omitted).

federal and state authorities cannot, by itself, constitute a sham prosecution.

B.

Angleton contends that *Bartkus* defined an additional class of successive federal-state prosecutions in which the dual sovereignty doctrine is inapplicable. He relies on language from *Houston,* 18 U.S. (5 Wheat.) 1, later interpreted in *Bartkus,* for the proposition that "where one sovereign is derivatively enforcing a statute of the other by explicitly incorporating it as a central element of an offense," a successive prosecution by the enforcing sovereign is barred. Angleton correctly notes that § 1958(a) incorporates the Texas capital murder statute.[16] He argues that the attempt of the United States derivatively to enforce the state statute dictates the conclusion that the sovereigns do not have "independent and separate interests."

In *Houston,* the Court reviewed the constitutionality of a Pennsylvania statute that derivatively enforced a federal statute by providing sanctions for members of the state militia who failed to answer the President's call to service. The Court stated, in *dictum,* that if the federal and state military tribunals exercised concurrent jurisdiction, the former prosecution might be pleaded in bar of the other. *Id.* at 31-32. In *Bartkus,* however, the Court, 359 U.S. at 130, stated that *Houston* could be cited "only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question."[17]

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[16] The federal murder for hire statute states in relevant part:

> Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed *in violation of the laws of any State* or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so. . . .

18 U.S.C. § 1958(a) (emphasis added).

Because *Houston* involved neither successive prosecutions nor a discussion of the dual sovereignty doctrine, its continual relevance is, to say the least, questionable. Moreover, Angleton's argument – that a sovereign derivatively enforcing the statute of another sovereign lacks an independent interest sufficient to justify its successive prosecution – was rejected in *Heath,* 474 U.S. at 82, in which the Court disavowed the "uncertain balance of interests approach," *id.* at 92.

Moreover, the United States is not seeking to enforce the state statute under which Angleton was acquitted. Instead, Congress has criminalized interstate activities involving murder for hire. Because Congress has acted within constitutional bounds, *United States v. Marek,* 238 F.3d 310, 321 (5th Cir.) (en banc), *cert. denied,* 534 U.S. 813, *and cert. denied,* 534 U.S. 813 (2001), it is free to define the crime as it deems proper, *United States v. Kozminski,* 487 U.S. 931-939 (1989), including the derivative use of borrowed statutes.

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[17] Angleton also cites *United States v. Mason,* 213 U.S. 115 (1909), in support of his argument that a sovereign cannot derivatively enforce the statute of another sovereign in a successive prosecution. Like *Houston, Mason* is "neither a double jeopardy nor a collateral estoppel holding." *United States v. Frumento,* 563 F.2d 1083, 1087 (3d Cir. 1977).

V.

Angleton reasons that § 1958(a) should be interpreted as requiring the United States to demonstrate a "substantial federal interest" before bringing a successive federal prosecution of an acquitted state murder for hire charge. He contends that in enacting § 1958(a), Congress "anticipated the grave federalism concerns raised by a successive prosecution under the statute by indicating an intent to reserve *any* federal prosecution . . . to cases raising substantial federal interests."

Angleton's argument is tantamount to urging an adoption of the Department of Justice's "*Petite* policy," which permits federal prosecutors to obtain authorization to bring a federal prosecution following a state prosecution for the same underlying conduct, where the state proceeding has left "substantial federal interests demonstrably unvindicated." *United States v. Jones,* 808 F.2d 561, 565 (7th Cir. 1986). As Angleton concedes, the *Petite* policy is not constitutionally mandated, because "the Constitution does not prohibit successive state-federal prosecutions." *United States v. Nelligan,* 573 F.2d 251, 254 (5th Cir. 1978) (citing *Rinaldi v. United States,* 434 U.S. 22, 28 (1977)).

So far as Angleton's argument can be interpreted as requiring a substantial federal interest to keep § 1958 within the scope of the Commerce Clause, it is also foreclosed. We recently confirmed the constitutionality of § 1958(a) in *Marek,* 238 F.3d at 320, interpreting the statute broadly to allow even *intrastate* use of a facility of interstate commerce.

VI.

Angleton argues that collateral estoppel prevents the empaneling of a federal jury to decide factual questions already determined by a state jury. Collateral estoppel, or issue preclusion, requires that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the *same parties* in any future lawsuit." *Ashe v. Swenson,* 397 U.S. 436, 443 (1970) (emphasis added). Collateral estoppel is inapplicable here, because the United States and Texas, as separate sovereigns, are not the "same party."

In *Ashe,* the Court held that collateral estoppel is embodied in the Double Jeopardy Clause. *Id.* at 445. Because that clause does not bar the United States from prosecuting a defendant for the same conduct after an unsuccessful state prosecution, and because collateral estoppel is embodied in the clause, collateral estoppel does not bar Angleton's successive federal prosecution. Because two sovereigns are permitted to prosecute for the same crime, "it would be anomalous, indeed, if a sovereign were allowed the greater power of reprosecuting individuals for offenses for which they had been acquitted but were denied the lesser power of proving the underlying facts of such offenses." *United States v. Tirrell,* 120 F.3d 670, 676 (7th Cir. 1997).

The order of the district court, denying Angleton's motion to dismiss the indictment, is AFFIRMED, and this matter is REMANDED for further appropriate proceedings.

As the government requests, in the interest of expediting this matter, the mandate shall issue forthwith.

221 F.Supp.2d 696

United States District Court,
S.D. Texas,
Houston Division.

UNITED STATES of America, Government,
v.
Robert N. **ANGLETON**, Defendant.

Criminal No. H-02-0040.

July 19, 2002.

Edward R. Gallagher, Terry Clark, James L. Turner, U.S. Attorneys Office, Houston, TX, U.S. Marshal-H, U.S. Probation,-H, Pretrial Services-H, Houston, TX, Financial Litigation, U.S. Attorneys Office, Southern District of Texas, Houston, TX, for Government.

Michael Wayne Ramsey, Houston, TX, for defendant.

MEMORANDUM AND OPINION

ROSENTHAL, District Judge.

In 1997, a Texas grand jury indicted Robert N. Angleton for the capital murder of his wife, Doris Angleton. The indictment alleged that Angleton had promised to pay his brother to have Doris Angleton killed. In August 1998, a Texas state jury acquitted Robert Angleton of the capital murder charge. In January 2002, a federal grand jury indicted Robert Angleton under the federal murder for hire statute, alleging that he had promised to pay his brother to have Doris Angleton killed and caused his brother to travel in interstate commerce and use interstate facilities to accomplish the murder. Angleton has moved to dismiss this federal indictment on the basis of his prior trial and acquittal on the state capital murder charge. The question before this court is whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars this prosecution and requires the dismissal of the federal indictment.[1]

This court concludes that although the State of Texas would be foreclosed from reprosecuting Angleton for the murder of his wife, the dual sovereignty doctrine, which permits the federal and state governments to prosecute an individual for the same act if that act violates the laws of each government, defeats Angleton's motion to dismiss. Long-standing precedent affirming and applying the dual sovereignty doctrine leads this court to conclude that double jeopardy does not bar this federal prosecution. However, not all of Angleton's arguments are frivolous, as that term is defined in *United States v. Dunbar,* 611 F.2d 985 (5th Cir.1980), and *United States v. Kalish,* 690 F.2d 1144, 1147 (1982), or made for the sole purpose of delaying this federal trial. Based on the finding of nonfrivolousness, Angleton is entitled to an expedited interlocutory appeal under *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) and *Dunbar,* 611 F.2d 985, that will postpone the trial until a determination is made of the merits of the appeal.

The reasons for these rulings are explained in detail below.

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[1] Angleton has also moved to dismiss Count I of the indictment, charging him with conspiracy to commit murder for hire, on the ground that it violates "Wharton's Rule" as expressed in *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). (Docket Entry No. 41). This opinion, however, only addresses the motion to dismiss based on double jeopardy.

I. Background[2]

In April 1997, Doris Angleton was shot to death in her home in Houston, Texas. An extensive investigation followed. The primary investigators were Houston Police Department Homicide Detective Sergeants Jerry Novak and David Ferguson. Suspicion focused on Robert Angleton, from whom Doris Angleton was seeking a divorce. Robert Angleton was familiar to state and federal law enforcement officers as a professional bookmaker who cooperated with local and federal law enforcement agencies, working as an informant while continuing his illegal activities. The investigation led the police officers to suspect that Roger Angleton, Robert Angleton's brother, was involved in the murder. Roger Angleton had lived in San Diego, California. (Docket Entry No. 38, Ex. 6, Vol. 6, at 166). Police developed evidence showing that shortly before the murder of Doris Angleton, Roger Angleton used various aliases to register in different hotel rooms and rent two cars in Houston, Texas. (*Id.* at 151-169; Vol. 7, at 7-43). A few days after the murder, Roger Angleton abandoned a suitcase at an airport security checkpoint after two guns were detected. (*Id.* at 25-37; 60-62; 157-58).[3] Roger Angleton was later arrested in Las Vegas, Nevada on unrelated California warrants. (*Id.* at 129-151). Police also developed evidence that showed mail communications between Angleton and his brother shortly before and after the murder. (Docket Entry No. 64, Ex. 3, at 14, 18).

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[2] The background facts recited are drawn from FBI Special Agent Cynthia Rosenthal's testimony at Angleton's arraignment, detention, and bond hearing; Angleton's statement of facts in his motion; and the documents made part of the record at the hearing, which include the federal indictment, the state indictment, the state jury verdict, the state jury instructions, the state trial transcript, the FBI interviews of the state jurors, and Angleton's Request for Pretrial Release previously considered by this court.

[3] These guns were not the same caliber as the guns used to murder Doris Angleton.

In the fall of 1997, following Roger Angleton's arrest in Las Vegas, Nevada, police arrested both brothers for Doris Angleton's murder. In October 1997, a Texas grand jury returned separate indictments against Roger Angleton and Robert Angleton for capital murder under section 19.03 of the Texas Penal Code. The Texas indictment against Robert Angleton alleged as follows:

> The duly organized Grand Jury of Harris County, presents in the District Court of Harris County, Texas, that in Harris County, Texas, ROBERT NICHOLAS ANGLETON, hereinafter styled the Defendant, on or about APRIL 16, 1997, did then and there unlawfully, intentionally, and knowingly cause the death of DORIS ANGLETON, hereafter styled the Complainant, by promising money to ROGER ANGLETON to cause the death of the Complainant for remuneration and the promise of remuneration.

(Docket Entry No. 38, Ex. 2).

Angleton and his brother were held without bond pending trial. In February 1997, Roger Angleton committed suicide in jail. He left behind a handwritten note indicating that he alone was responsible for Doris Angleton's murder.

The state trial of Robert Angleton began in July 1998. During the trial, HPD Detective Sergeants Novak and Ferguson testified and HPD Officer Jewel acted as the liaison between the police department and the Harris

County District Attorney's Office. (Docket Entry No. 64, Ex. 3, at 27). During the trial, state prosecutors introduced at least one piece of evidence obtained by the Federal Bureau of Investigation, a surveillance tape from an unrelated investigation containing Angleton's voice.[4] On August 12, 1998, the jury acquitted Angleton of the capital murder for hire charge. (Docket Entry No. 38, Ex. 3). Angleton's acquittal was the first acquittal in a capital murder case tried in Harris County since the death penalty was reinstated in 1976. (Docket Entry No. 64, Ex. 3, at 34).

Approximately six months after the acquittal, FBI Special Agent Cynthia Rosenthal and another FBI agent began investigating Angleton for violations of federal law, including money laundering and RICO violations relating to his gambling and bookmaking activities and income tax evasion. (*Id.* at 11, 26). This investigation did not include the murder of Doris Angleton. State officials cooperated with this federal investigation. (*Id.* at 26). At some later date, the Harris County District Attorney's Office asked the United States Attorney's Office to investigate Angleton for murder for hire under federal law. (*Id.* at 28). In April 2000, the United States Attorney's Office asked the FBI to expand its investigation of Robert Angleton's activities to include his role in the murder of his wife. (*Id.*). An *ad hoc,* undocumented joint task force of federal and state officials, consisting of Special Agent Cynthia Rosenthal, other FBI agents, HPD Sergeants Novak and Ferguson, and

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[4] This tape was obtained from previous investigations involving Angleton in his role as an informant for the Houston Police Department and the FBI relating to his bookmaking and gambling activities.

HPD Officer Jewel, was formed. (*Id.* at 27-28).[5] Sergeants Novak and Ferguson were the primary case agents who originally investigated Doris Angleton's murder and testified in Angleton's state trial; officer Jewel was the liaison between the HPD and the state prosecutors. (*Id.;* Docket Entry No. 38, Ex. 6, Vol. 1, at 5-6). The three HPD members of the joint task force were deputized as United States Deputy Marshals so that they could access FBI files. (Docket Entry No. 64, Ex. 3, at 45-46). The HPD continued to pay their salaries. (*Id.*). The joint task force received all the information the HPD had gathered for use in the state prosecution. (*Id.* at 28). The two assistant district attorneys who prosecuted Angleton in the state trial, who are personal friends of FBI Special Agent Rosenthal, also cooperated with and encouraged the federal/state joint task force. (*Id.* at 35). As part of the investigation, FBI agents interviewed members of the jury that had acquitted Angleton.[6] Angleton's counsel have been allowed to review and summarize the FBI reports of these interviews. From these summaries, it appears that the questioning focused on how various pieces of evidence and other trial strategies impacted the jurors' decision to vote not guilty. (Docket Entry No. 64, Ex. 1). The parties agree that the federal prosecution will rely on much of the same evidence as the state prosecution.[7]

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[5] The involvement of the Houston Police Department and the Harris County District Attorney's office in the federal investigation and indictment was detailed by FBI Special Agent Cynthia Rosenthal in her testimony at Angleton's arraignment.

[6] The defense presented its summary of the FBI reports at the hearing. The government objected to this document, not on the basis of reliability, but rather on the basis that the summaries are not relevant to the issues now before this court. The fact that the FBI interviewed the state court jurors is relevant to the issue of collusion between the state and federal prosecutions, which Angleton asserts bars this prosecution under *Bartkus v. Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) and its progeny. The summary is admissible for this limited purpose.

No federal indictment was returned alleging that Angleton had violated RICO or committed money laundering or income tax evasion, charges that the federal agents had first investigated. In January 2002, a federal grand jury returned a three-count indictment against Angleton, based on the 1997 murder of Doris Angleton. Count One of the indictment charges Angleton with conspiring to commit murder for hire, in violation of 18 U.S.C. § 1958.[8] It states:

> From an unknown date believed to be in January, 1997, in the Southern District and Northern Districts of Texas and the State of California, the defendant, did knowingly and willfully combine, conspire, confederate and agree with Roger

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[7] The joint task force has received one piece of new evidence, a tape recording of an interview Angleton gave to a writer, Vanessa Leggett, and has continued to develop previously available evidence, including an enhanced tape recording that was a focus of the state trial.

[8] Section 1958(a) provides, in relevant part:

> Whoever travels in or causes another . . . to travel in interstate or foreign commerce, or uses or causes another . . . to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State . . . as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, . . . and if death results, shall be punished by death or life imprisonment, or shall be fined not more than $250,000, or both.

> Angleton, not indicted herein, to cause another to travel in interstate commerce and use a facility in interstate commerce with intent that the murder of Doris Angleton be committed in violation of the laws of the State of Texas and the United States, as consideration for the receipt of, and as consideration for a promise and agreement to pay, a thing of pecuniary value, that is, United States Currency, such conduct resulting in the death of Doris Angleton.

(Docket Entry No. 38, Ex. 1). The indictment then alleges the methods, means, and overt acts of the conspiracy, including that Robert Angleton agreed to pay Roger Angleton to have Doris Angleton murdered; that Roger Angleton traveled from California to Texas to prepare for the killing; that Roger Angleton shot Doris Angleton in Houston, then left the city; and that the plan included Robert Angleton's agreement to pay Roger Angleton even if he was captured and Roger Angleton's agreement to take the full blame and attempt to exonerate his brother if he was captured.

Count Two of the indictment charges Robert Angleton with committing murder for hire, in violation of 18 U.S.C. § 1958. Count Two states:

> From an unknown date, believed to be in January of 1997, and continuing until April 16, 1997, in the Southern District of Texas, the defendant, Robert Nicholas Angleton, aided and abetted by Roger Angleton, not indicted herein, did cause another to travel in interstate commerce and did use a facility of interstate commerce with intent that the murder of Doris Angleton be committed in violation of the laws of the State of Texas and

> the United States, as consideration for the receipt of, and as consideration for a promise and agreement to pay, a thing of pecuniary value, that is, United States Currency, such conduct resulting in the death of Doris Angleton.

(*Id.*).[9]

Count Three of the indictment charges Angleton with using a firearm in connection with a crime of violence, in violation of 18 U.S.C. § 924(c)(1).[10] Count Three states:

> On or about April 16, 1997, in the Southern District of Texas, the defendant, Robert Nicholas

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[9] Counts One and Two additionally charge violations of 18 U.S.C. § 2, the aiding and abetting statute. That statute defines which actors may be charged for violating other substantive criminal statutes and cannot alone be violated. *See United States v. Sorrells,* 145 F.3d 744, 752 (5th Cir.1998) (18 U.S.C. § 2 "does not define a separate crime, but rather provides another means of convicting someone of the underlying offense.") (internal quotations and citations omitted).

[10] Section 924(c)(1) provides, in relevant part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime – (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

> Angleton, aided and abetted by Roger Angleton, not indicted herein, did knowingly use and carry a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, as alleged in Counts One and Two of this Indictment.

(*Id.*).

Angleton challenges the federal indictment under the Double Jeopardy Clause on several grounds. First, Angleton argues that the nature and extent of the state officials' involvement in Angleton's federal indictment and prosecution amounts to collusion between the state and federal governments that triggers the "sham prosecution" exception to the dual sovereignty doctrine. Second, he contends that because the federal murder for hire statute, 18 U.S.C. § 1958, incorporates the Texas capital murder statute, there is no separate federal basis for this prosecution. Angleton relies on the pre-Civil War case of *Houston v. Moore,* 18 U.S. (5 Wheat.) 1, 5 L.Ed. 19 (1820), for the argument that the incorporation of the state statute into the federal statute bars the successive federal prosecution as derivative of the failed state effort. Third, Angleton argues that collateral estoppel applies to bar this prosecution because at least one essential fact as to each count in the federal indictment was necessarily determined in the former trial. Fourth, Angleton argues that to apply 18 U.S.C. § 1958 to make a federal case out of what has historically been a state law crime, that has already been tried in a state court, raises serious constitutional issues of due process, federalism, and the limits on Congress's power under the Commerce Clause. Angleton argues that this court should avoid these constitutional issues by adopting a narrow interpretation of 18 U.S.C. § 1958 and require a showing of a compelling federal interest in this successive federal prosecution. Angleton argues that no such interest can be demonstrated.

Angleton urges that these grounds require the dismissal of this indictment. At a minimum, Angleton contends that the arguments he raises are colorable and, therefore, not frivolous, permitting him an interlocutory appeal that divests this court of jurisdiction to proceed with his trial until the appeal is decided.

The government's primary response is that under binding Supreme Court and Fifth Circuit case law, the dual sovereignty doctrine applies to permit the federal government, a separate sovereign from the State of Texas, to prosecute Angleton for the separate, federal offense that arose from the use of interstate facilities and travel to commit the murder for hire of his wife. The government asserts that the degree of federal and state cooperation in obtaining this successive indictment is well within the limits of the dual sovereignty doctrine and far less than courts have required to trigger any sham prosecution exception to that doctrine. The government contends that under well-established law, murder for hire is a federal crime when its perpetration involves the use of interstate travel or facilities in interstate commerce, and that this indictment does not strain constitutional limits. Finally, the government argues that the law is so clear that Angleton's challenges should be deemed frivolous, so that this court retains jurisdiction to proceed with his trial during any interlocutory appeal.

In accordance with *United States v. Stricklin,* 591 F.2d 1112, 1117-18 (5th Cir.1979), this court held a pretrial hearing to provide Angleton an opportunity to present evidence in support of a *prima facie* case of double jeopardy. (Docket Entry No. 63); *see United States v. Patterson,* 809 F.2d 244, 247 (5th Cir.1987). Angleton has submitted the federal indictment (Docket Entry No. 38, Ex. 1); the state indictment (*Id.,* Ex. 2); the state jury verdict and judgment (*Id.,* Ex. 3); a copy of Texas Penal Code §§ 19.02-.03 (*Id.,* Ex. 4); the state jury instructions (*Id.,* Ex. 5); the transcript of the state trial (*Id.,* Ex. 6); defense counsel's summaries of the FBI interviews of the state jurors and alternates (Docket Entry No. 64, Ex. 1); Angleton's Request for Pretrial Release (*Id.,* Ex. 2); and the transcript of Angleton's Arraignment, Detention and Bond Hearing containing the testimony of FBI Special Agent Rosenthal, who was in charge of the joint task force investigation (*Id.,* Ex. 3). Both the government and Angleton presented oral argument and both have filed extensive briefs.

Each of Angleton's arguments, and the government's response, is addressed below.

II. The Law of Double Jeopardy

A. Procedural Rules Governing Double Jeopardy Claims

The Fifth Circuit has established procedures for district courts to apply in analyzing double jeopardy claims raised before trial. In *Stricklin,* 591 F.2d 1112, the Fifth Circuit addressed a double jeopardy claim arising from three federal court indictments for drug trafficking conspiracies. The Fifth Circuit held that a defendant bears the burden of establishing a "*prima facie* nonfrivolous double jeopardy claim." *Id.* at 1117-18. Once a defendant has "made a nonfrivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy," the burden of persuasion shifts to the government to prove by a preponderance of the evidence that two separate crimes are charged. *Id.* To make the *prima facie* showing of double jeopardy, the defendant may refer to the indictments, his own testimony at the pretrial hearing, or by presenting other evidence normally available at the pretrial stage. *Id.* The government may then respond with sufficient evidence to demonstrate by a preponderance of the evidence that two separate crimes are charged. The procedure for addressing double jeopardy claims "in no way alters the discovery now available to defendants." *Id.* at 1118.

Stricklin did not involve successive prosecutions by different sovereigns. The only issue in *Stricklin* was whether the indictments charged the same offense under the standards of *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *See United States v. Sharpe,* 193 F.3d 852, 863 (5th Cir.1999) (citing *United States v. Dixon,* 509 U.S. 688, 697, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993)). In the Supreme Court's most recent case on the dual sovereignty doctrine in the context of a double jeopardy claim, *Heath v. Alabama,* 474 U.S. 82, 87, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985), the Court first analyzed whether the two offenses charged were the "same" for double jeopardy purposes. The Court then turned to determining whether the "two entities that seek successively to prosecute the defendant for the same course of conduct can be termed separate sovereigns." *Id.* at 88, 106 S.Ct. 433. Fifth Circuit cases considering double jeopardy claims involving two sovereigns have followed this approach. *See United States v. Cooper,* 949 F.2d 737, 750-51 (5th Cir.1991); *United States v. Moore,* 958 F.2d 646, 650 (5th Cir.1992).

To establish a *prima facie* claim of double jeopardy, Angleton must first show that the offenses charged in the state and federal indictments are the "same offense" under the *Blockburger* test. If the offenses are the "same" for the purpose of double jeopardy, the government must show that the dual sovereignty doctrine applies. Angleton contends that this court should apply the sham prosecution exception to the dual sovereignty doctrine; he must make a *prima facie* showing that the federal prosecution was a mere tool of the state prosecution. *Cooper,* 949 F.2d at 750-51; *Patterson,* 809 F.2d at 247. If he makes such a showing, the burden shifts to the government.

The threshold issue is whether the federal indictment charges the same offenses that were the basis of Angleton's state trial and acquittal.

B. The *Blockburger* Analysis

The Fifth Amendment to the United States Constitution commands that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. A subsequent prosecution avoids double jeopardy if the charged offenses are not the same. The government contends that under the test established in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), this federal indictment does not charge the same offense because the offenses alleged in counts one through three do not contain the same elements as the Texas capital murder statute under which Angleton was acquitted. Angleton asserts that, under the *Blockburger* test, Counts One and Two of the federal indictment are the "same offense" as the capital murder charge contained in the state indictment. In addition, Angleton asserts that Counts One and Two are, as compared to each other, the "same offense" and, thus, he cannot be charged with both conspiracy to commit murder for hire and the commission of murder for hire under 18 U.S.C. § 1958. As for Count Three, Angleton argues that the count fails if double jeopardy bars Counts One and Two because Count Three can proceed only if the alleged underlying crime is an offense for which the defendant "may be prosecuted in a court of the United States." 18 U.S.C § 924(c)(1)(A). The government does not contest Angleton's analysis of Count Three.

"Under the *Blockburger* test, each offense must contain an element not contained in the other; if not, they are the same offense within the Clause's meaning and double jeopardy bars subsequent punishment or prosecution." *Sharpe,* 193 F.3d at 863 (citing *Dixon,* 509 U.S. at 697, 113 S.Ct. 2849); *see also Texas v. Cobb,* 532 U.S. 162, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) (applying the *Blockburger* test to determine whether two offenses are the same); *United States v. Avants,* 278 F.3d 510, 516 (5th Cir.2002) (same). The *Blockburger* test focuses on the elements of the charged offense rather than the evidence presented at trial. *Illinois v. Vitale,* 447 U.S. 410, 413-15, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980).

Angleton is charged with both conspiracy to commit murder for hire and committing murder for hire. The elements of commission of murder for hire resulting in death are: 1) travel in or causing another to travel in interstate commerce, or using or causing another to use the mail or any facility in interstate or foreign commerce;

with 2) intent that a murder be committed in violation of the laws of Texas;[11] 3) as consideration for a promise or agreement to pay anything of pecuniary value; 4) resulting in a death. The elements of conspiracy to commit murder for hire are identical, with the addition of the element of conspiring with another. (Docket Entry No. 38, Ex. 1). Conspiracy and the substantive offense that is the object of the conspiracy are separate and distinct crimes. *See, e.g., United States v. Hernandez,* 141 F.3d 1042 (11th Cir.1998); *United States v. Romeros,* 600 F.2d 1104, 1105 (5th Cir.1979) (citing *Iannelli v. United States,* 420 U.S. 770, 777-778, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); *United States v. Ragano,* 520 F.2d 1191, 1198 (5th Cir.1975)). Charging Angleton with conspiracy to commit murder for hire and the substantive offense of murder for hire under 18 U.S.C. § 1958 does not violate the Double Jeopardy Clause.

Angleton was indicted for, and acquitted of, the offense of capital murder under Texas Penal Code § 19.03(a)(3). Angleton argues that conspiracy to commit murder for hire and the commission of murder for hire under section 1958 are the same offense as capital murder for remuneration under Texas law because there is no additional element in the state offense that is not contained in the two federal offenses separately.[12]

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[11] The indictment charges intent to commit a murder "in violation of the laws of the State of Texas and the United States." (Docket Entry No. 38, Ex. 1). The government concedes, however, that there is no general federal murder statute and no other applicable federal murder statute. (Docket Entry No. 51, at 30).

The elements of the offense charged in the state indictment are: 1) intentionally or knowingly; 2) causing death; 3) by employing another to commit the murder for remuneration or the promise of remuneration. (Docket Entry No. 38, Ex. 2). Both the state and federal offenses require: 1) intent; 2) death; and 3) commission of the murder for remuneration. The federal offenses each require proof of additional elements – a conspiracy and interstate travel – but the state murder charge does not. The government argues that the state charge of murder for remuneration requires proof that a death occurred, which is not an element under section 1958. However, if, as here, a death occurred, section 1958 provides for an enhanced maximum penalty of life imprisonment or death, which increases the statutory punishment. The fact that a death occurred must be pleaded in the indictment, submitted to the jury, and found beyond a reasonable doubt. *See Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348,

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[12] Section 19.03(a)(3) provides:

> (a) A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and: . . .
>
> (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
>
> . . . .

Texas Penal Code § 19.02(b)(1) provides:

> (b) A person commits an offense if he:
>
> (1) intentionally or knowingly causes the death of an individual;
>
> . . . .

147 L.Ed.2d 435 (2000); *Ring v. Arizona,* 536 U.S. ___, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). There is no additional element in the state charge against Angleton that is not contained in the first two counts of the federal indictment.

The offenses charged in Counts One and Two of the indictment are, for *Blockburger* purposes, the same offense as the Texas capital murder charge for which Angleton was tried and acquitted. *See, e.g., United States v. Basile,* 109 F.3d 1304, 1306-07 (8th Cir.), *cert. denied,* 522 U.S. 873, 118 S.Ct. 189, 139 L.Ed.2d 128, *cert. denied sub nom., DeCaro v. United States,* 522 U.S. 866, 118 S.Ct. 173, 139 L.Ed.2d 115 (1997) (assuming that federal murder for hire indictment charged same offense as state murder charges arising from same conduct and applying dual sovereignty doctrine).

If the dual sovereignty doctrine applies, double jeopardy does not prevent the federal government from prosecuting Angleton for the same offense. *See Abbate v. United States,* 359 U.S. 187, 196, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959); *United States v. McKinney,* 53 F.3d 664, 676 (5th Cir.1995). Angleton argues that the dual sovereignty doctrine does not apply based on exceptions to the doctrine recognized in *Bartkus v. Illinois,* 359 U.S. 121, 123, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959), and *Houston v. Moore,* 18 U.S. (5 Wheat.) 1, 5 L.Ed. 19 (1820). Alternatively, he urges that the underpinnings of the doctrine have been so eroded that it should be reexamined and its application to these facts rejected.

C. The Dual Sovereignty Doctrine

Even if two offenses contain the same elements, "successive prosecutions by separate sovereigns for crimes arising out of the same acts are not barred" by double jeopardy. *United States v. Johnson,* 91 F.3d 695, 697 (5th Cir.1996) (applying dual sovereignty doctrine to allegations of prosecutorial vindictiveness). The dual sovereignty doctrine rests on the notion that a defendant whose conduct violates the laws of two sovereigns has "committed two different offenses by the same act, and [thus] a conviction by a court [of one sovereign] of the offense against that [sovereign] is not a conviction of the different offense against the [other sovereign] and so is not double jeopardy." *United States v. Lanza,* 260 U.S. 377, 382, 43 S.Ct. 141, 67 L.Ed. 314 (1922).

The United States Supreme Court first used the dual sovereignty concept in *Lanza* to uphold a federal prosecution after a state prosecution for the same offense. However, the Court had discussed the doctrine in two pre-Civil War cases, *Fox v. Ohio,* 46 U.S (5 How.) 410, 12 L.Ed. 213 (1847), and *Moore v. Illinois,* 55 U.S (14 How.) 13, 14 L.Ed. 306 (1852). In *Fox,* the Court considered a challenge to the constitutionality of a state statute criminalizing the use of counterfeit United States currency. The defendant argued that the state statute was unconstitutional because only Congress had jurisdiction to criminalize the conduct in question. In support of this argument, the defendant contended that allowing a state to criminalize the use of counterfeit United States currency could result in a violation of the Fifth Amendment because a state and the federal government might punish an individual for the same illegal act. The Court rejected this concern, noting that under *Barron v. City of Baltimore,* 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833), the Bill of Rights, including the Fifth Amendment, was a restriction only on the federal government, not on the power of the state governments.

Id. 46 U.S. at 434. Responding to the argument that successive punishment could be imposed for the same conduct, the Court stated:

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and Federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.

Id. at 435. Justice McLean dissented, arguing that the majority's result established

> a great defect in our system. For the punishment under the State law would be no bar to a prosecution under the law of Congress. And to punish the same act by the two governments would violate, not only the common principles of humanity, but would be repugnant to the nature of both governments. If there were a concurrent power in both governments to punish the same act, a conviction under the laws of either could be pleaded in bar to a prosecution by the other. But it is not pretended that the conviction of Malinda Fox, under the State law, is a bar to a prosecution under the law of Congress. Each government, in prescribing the punishment, was governed by the nature of the offense, and must be supposed to have acted in reference to its own sovereignty. There is no principle better established by the common law, none more fully recognized in the federal and State constitutions, than that an individual shall not be put in jeopardy twice for the same offense. This, it is true, applies to the

> respective governments; but its spirit applies with equal force against a double punishment, for the same act, by a State and a federal government.

Id. at 439.

In *Moore v. Illinois,* 55 U.S. at 17, the Court considered the constitutionality of an Illinois statute criminalizing "harboring or secreting a negro slave." *Id.* The defendant argued that the statute was unconstitutional because it conflicted with the constitutional provision and act of Congress on the same subject. The defendant also argued that the Illinois statute was void because it could subject "the delinquent to a double punishment for a single offense." *Id.* at 19. The Court rejected this argument, stating the now classic expression of the dual sovereignty doctrine:

> Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offenses; but only by one act he has committed two offenses, for each of which he is justly punishable.

Id. at 20. Justice McLean again dissented, arguing that the federal statute should be held to preempt state statutes criminalizing the same conduct in order to avoid a result so "contrary to the nature and genius of our government" as "to punish an individual twice for the same offense." *Id.* at 21-22.

In *Lanza,* decided in 1922, the Court upheld a federal prosecution after the state had convicted the defendant for the same offense. 260 U.S. 377, 43 S.Ct. 141. The federal government indicted the defendant under the National Prohibition Act, 41 Stat. 305 (1921), legislation Congress enacted in 1919 to enforce the Eighteenth Amendment. The defendant had previously been convicted for violating a state law that proscribed the manufacture, transport, or possession of liquor. The district court dismissed the federal indictment. The argument before the Supreme Court centered on the provision of the Eighteenth Amendment to the United States Constitution that gave state and federal governments concurrent power to enforce prohibition. U.S. Const. amend. 18, § 2. The defendant argued that both the state law under which he had been convicted and the federal statute under which he was subsequently indicted derived from the same source, the second section of the Eighteenth Amendment, making a prosecution by the state "in principle" a prosecution by the United States in its courts. *Id.* at 379-80, 43 S.Ct. 141. The Supreme Court rejected the argument, holding that the Double Jeopardy Clause did not bar the federal government from prosecuting an individual for the same offense for which he had been tried previously in a state court. The Court's language was broad:

> Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> . . . .

> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government . . . and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority. Here the same act was an offense against the state of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy.

Id. at 382, 43 S.Ct. 141.

The Court did not limit its language to cases arising under the Eighteenth Amendment, which established an area of concurrent state and national power. Instead, the Court endorsed in broad terms the dual sovereignty doctrine that had been articulated in *Fox v. Ohio* and *Moore v. Illinois,* describing these cases as a "long line of decisions" supporting a view of the Fifth Amendment that permitted successive prosecutions for the same conduct. The Court explained why it believed its decision to be sound:

> If a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts

> would not make for respect for the federal statute or for its deterrent effect.

Id. 43 S.Ct. at 143.

In 1959, the Supreme Court decided *Bartkus v. Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959), holding that the Fourteenth Amendment did not bar a state from prosecuting the defendant after the federal government had already tried him for the same offense. On the same day, the Court decided *Abbate v. United States,* 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959), holding that the Fifth Amendment did not bar the federal government from prosecuting two individuals for the same offense for which they had previously been tried in state court. Both decisions issued on a vote of five to four. Both cases rested in part on the fact that the Double Jeopardy Clause was considered inapplicable to the states, *Bartkus,* 359 U.S. at 123-39, 79 S.Ct. 676; *Abbate,* 359 U.S. at 198-96, 79 S.Ct. 666, a position changed when the Court decided *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). In both cases, Justice Black dissented, vigorously arguing "that a federal trial following a state acquittal or conviction is barred by the Double Jeopardy Clause of the Fifth Amendment" and that a state conviction following a federal prosecution "cannot stand. For I think double prosecutions for the same offense are so contrary to the spirit of our free country that they violate even the prevailing view of the Fourteenth Amendment. . . . " *Bartkus,* at 150-51, 79 S.Ct. 676.

In *Bartkus,* the defendant was indicted, tried, and acquitted in federal court on charges that he had robbed a federally insured savings and loan association located in Illinois. Three weeks later, an Illinois state grand jury indicted the defendant for the same acts, charging him with violating a state robbery statute. The Supreme Court affirmed the second, state prosecution under the Due Process Clause of the Fourteenth Amendment, relying on the inapplicability of the Double Jeopardy Clause to the states and on what the majority described as a "long, unbroken, unquestioned course of impressive adjudication" before and since *Lanza* permitting a "second prosecution where the first was by a different government and for violation of a different statute." 359 U.S. at 135, 79 S.Ct. 676. The majority echoed the themes sounded in *Lanza:* the theoretical basis of the doctrine of dual sovereignty, that the same conduct may violate the law of separate sovereigns and be subject to separate punishment, and the practical concern that if a successive prosecution was barred in all cases a defendant would seek immunization from significant punishment by manipulating the system to ensure that the first prosecution was in the jurisdiction that imposed a much less severe sanction. In the context of a successive state prosecution, such a result would "be in derogation of our federal system" because it would allow the "federal prosecution of a comparatively minor offense to prevent state prosecution of [a] grave . . . infraction of state law." *Id.* at 137, 79 S.Ct. 676.

In his dissent, Justice Black criticized the majority's characterization of the precedents, noting that "[d]espite its exhaustive research, the Court has cited only three cases before *Lanza* where a new trial after an acquittal was upheld." *Id.* at 161, 79 S.Ct. 676.[13] Only one of these cases, a 1915 decision from the State of Washington, clearly allowed a reprosecution and conviction following an acquittal for the same offense. *Id.* (citing *State v. Kenney,* 83 Wash. 441, 145 P. 450 (1915)). As to the cases decided after *Lanza,* the majority cited one state case decided in 1943 and four federal cases decided in the 1950s, allowing successive prosecutions. *Id.* at 163 n. 33, 79 S.Ct. 676. It is on this "meager basis," as contrasted with historical opposition to the practice of double prosecutions, that the Court rested its finding that Bartkus's retrial did not violate the "fundamental principles 'rooted in the traditions and conscience of our peoples.'" *Id.* at 162, 79 S.Ct. 676.[14]

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[13] Justice Brennan also dissented in *Bartkus*. His dissent dealt primarily with the "sham prosecution" exception and is discussed below.

Justice Black made his own point as to the practical impact of the dual sovereignty doctrine:

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[14] Academic commentators have also found fault with Justice Frankfurter's characterization of the record of authority supporting successive prosecutions by state and federal courts. "The existing body of precedent did not present the 'irrefutable evidence' he described. The course of adjudication was not 'long,' 'unbroken,' or 'unquestioned'; frankly, it was not that 'impressive.'" Daniel Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism,* 20 AM.J.CRIM.L. 1 (1992); *see also* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King,* 95 COLUM.L.REV. 1 (1995); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy,* 73 N.C.L.REV. 1159 (1995). However, commentators have also recognized that despite these criticisms, "candor requires acknowledgment that, in 1922, the most obvious of the existing precedents supported successive prosecutions." Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy,* 14 N.Y.U.REV.L. & SOC. CHANGE 383, 402 (1986), *quoted in* Braun, *Praying to False Sovereigns,* at 10.

> The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, then when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.

Id. at 155, 79 S.Ct. 676. Justice Black rejected the argument that effective law enforcement required the opportunity for "double prosecutions" by the states and federal government. If Congress believed that the states were subverting federal laws by imposing inadequate penalties, Congress could preempt the states' involvement or set minimum penalties to protect federal interests. *Id.* at 157, 79 S.Ct. 676.[15]

In *Abbate,* the defendants pleaded guilty to violating an Illinois statute criminalizing conspiracy to injure or destroy the property of another. 359 U.S. at 187, 79 S.Ct. 666. The pleas arose from an aborted plan to dynamite communications facilities during a union strike against the communications company. Defendants received three month state prison terms. Early the next year, a federal grand jury indicted defendants for conspiracy to injure or destroy a means of communication operated or controlled by the United States, based on the fact that the targeted facilities carried cables used by federal agencies. *Id.* at 188-89, 79 S.Ct. 666. Because this case involved a successive federal prosecution, the Court confronted the Fifth Amendment Double Jeopardy Clause. The Court briefly reviewed the dual sovereignty doctrine jurisprudence, concluding that *Lanza* had been correctly decided. The Court again emphasized the practical concern that overruling *Lanza* would hinder federal law enforcement unless the federal government displaced state power to prosecute crimes based on acts that also violated federal law. "This would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes." *Id.* at 195, 79 S.Ct. 666. Justice Black again dissented, noting that *Lanza* itself relied on *dicta* in *Fox v. Ohio* and *Moore v. Illinois.* Justice Black remained unconvinced "that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither of them can do separately.' *Id.* at 203, 79 S.Ct. 666.

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[15] Justice Black argued that *Lanza* could be limited to the unusual context of Prohibition in which the case arose: the specific creation in the Eighteenth Amendment of an "area of concurrent state and national power where the Federal Government was not supreme." *Id.*, 157 n. 16. However, the *Lanza* opinion is not so narrowly drafted, and *Bartkus* and *Abbate* did not read it narrowly.

In response to *Bartkus,* the Department of Justice implemented the so-called *Petite* policy, first recognized by the courts in *Petite v. United States,* 361 U.S. 529, 531, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960) (per curiam). The policy "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same acts or transactions" unless the prior prosecution has left a "substantial interest . . . demonstrably unvindicated." 3 DEPT. OF JUSTICE MANUAL tit. 9-2.031(A) (2d ed.2002-1 Supp.).

The Supreme Court's most recent case applying the dual sovereignty doctrine in the context of double jeopardy is *Heath v. Alabama,* 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985). In that case, the defendant hired two individuals to murder his wife. *Id.* at 83-84, 106 S.Ct. 433. The wife was kidnaped from their residence in Alabama. Her body was later found in an abandoned car in Georgia. Georgia and Alabama conducted dual investigations into the kidnaping and murder, with some cooperation. A Georgia grand jury indicted Heath for "malice" murder under Georgia law. Heath pleaded guilty to the murder in exchange for a life sentence. *Id.* at 84, 106 S.Ct. 433. A few months later, a grand jury in Alabama indicted Heath for the capital offense of murder during a kidnaping. Heath was convicted and sentenced to death. Heath argued that his Georgia conviction barred the subsequent Alabama conviction for charges based on the same conduct. The issue was whether the dual sovereignty doctrine permitted a second state to prosecute for the same offense when double jeopardy would have prevented the first state from doing so. *Id.* at 88, 106 S.Ct. 433. The Court concluded that because the states are presumptively separate sovereigns, Heath's prosecution by each in succession did not constitute double jeopardy. *Id.* at 89-93, 106 S.Ct. 433.

Heath, decided in 1985, applied the dual sovereignty doctrine to successive prosecutions by two states. The Supreme Court has not considered a case involving successive state and federal prosecutions for the same offense since deciding *Bartkus* and *Abbate* in 1959. Angleton urges that specific developments justify a reexamination of the dual sovereignty doctrine. After *Lanza, Bartkus,* and *Abbate* were decided, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). However, the Court has not examined the impact of this holding on the dual sovereignty doctrine articulated in the earlier cases. The Court's silence is in contrast to its approach to the dual sovereignty doctrine in cases decided under the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment after they were held to apply to the states.

In *Elkins v. United States,* 364 U.S. 206, 215, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960), decided after the Court recognized that the Fourth Amendment applied to the states, the Court discarded the "silver platter doctrine," under which evidence obtained by state officials through unreasonable searches or seizures could be introduced as evidence in a federal criminal trial. In support of its holding, the Court echoed Justice Black's dissents in *Bartkus* and *Abbate:* "To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215, 80 S.Ct. 1437. Justice Harlan dissented, arguing that the Court's decision abandoned "sound constitutional doctrine under our federal scheme of things, doctrine which only as recently as last Term was reiterated by this Court. *See Abbate v. United States . . . Bartkus v. Illinois. . . .* " *Id.* at 252, 80 S.Ct. 1437. In *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 77-78, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), decided after the recognition that the Self-Incrimination Clause applied to the states, the Court overruled previous decisions under which a state or the federal government could compel a witness to give testimony which might incriminate the witness in the other sovereign's courts. In overruling this precedent, the Court discarded the "'separate sovereignty' theory of self-incrimination." *Id.* at 89, 84 S.Ct. 1594 (Harlan, J., concurring). The Court reasoned that the policies behind the privilege would be frustrated by the dual sovereignty doctrine, which allowed a defendant to be "'whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination applied to each." *Id.* at 55, 84 S.Ct. 1594 (quoting *Knapp v. Schweitzer,* 357 U.S. 371, 385, 78 S.Ct. 1302, 2 L.Ed.2d 1393 (1958) (Black, J., dissenting)). This problem, the Court noted, was especially significant "in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity." *Id.* By contrast, despite the decision in *Benton v. Maryland,* applying the Double Jeopardy Clause to the states, the Supreme Court has not examined whether the dual sovereignty doctrine applied in *Bartkus* and *Abbate* should be reexamined.

The increase in the scope of federal criminal law, a "dramatic change[ ] that ha[s] occurred in the relationship between the federal government and the states since the time of *Bartkus* and *Abbate,*" has greatly expanded the likelihood of successive prosecutions. The successive prosecutions permitted under the dual sovereignty doctrine in *Bartkus, Abbate,* and *Heath* stand in tension with the Court's recognition in cases such as *Green v. United States,* that a government may not repeatedly prosecute an individual, "thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety, insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." 355 U.S. 184, 187-188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). The expansion of federal criminal law into many areas also subject to state criminal statutes increases this tension.

Despite such developments and criticism of the dual sovereignty doctrine, the circuit courts have continued to reaffirm and apply *Bartkus, Abbate,* and *Heath* to uphold successive prosecutions by state and federal governments, as well as by the federal government and foreign governments. *See McKinney,* 53 F.3d at 676, *cert. denied,* 516 U.S. 970, 116 S.Ct. 431, 133 L.Ed.2d 346 (1995) (federal prosecution not barred by prior state guilty plea); *United States v. Guzman,* 85 F.3d 823, 826 (1st Cir.), *cert. denied,* 519 U.S. 1020, 117 S.Ct. 537, 136 L.Ed.2d 422 (1996) (federal prosecution not barred by prior foreign conviction); *United States v. Sewell,* 252 F.3d 647 (2d Cir.2001) (federal prosecution not barred by prior state acquittal); *United States v. Bell,* 113 F.3d 1345, 1351 n. 6 (3rd Cir.), *cert. denied,* 522 U.S. 984, 118 S.Ct. 447, 139 L.Ed.2d 383 (1997) (federal prosecution not barred by prior state acquittal); *United States v. Montgomery,* 262 F.3d 233, 238 (4th Cir.), *cert. denied,* ___ U.S. ___, 122 S.Ct. 845, 151 L.Ed.2d 723 (2001) (federal prosecution not barred by prior state guilty plea); *United States v. Holmes,* 111 F.3d 463, 467 (6th Cir.1997) (federal prosecution not barred by prior state civil judgment of punitive damages); *United States v. Ray,* 238 F.3d 828, 835 (7th Cir.), *cert. denied,* 532 U.S. 1045, 121 S.Ct. 2014, 149 L.Ed.2d 1015 (20[illegible] (federal prosecution not barred by prior state conviction); *United States v. Johnson,* 169 F.3d 1092, 1095-96 (8th Cir.), *cert. denied,* 528 U.S. 857, 120 S.Ct. 143, 145 L.Ed.2d 121 (1999) (same); *United States v. Male Juvenile,* 280 F.3d 1008, 1021 (9th Cir.2002) (federal prosecution not barred by prior tribal court prosecution); *United States v. Trammell,* 133 F.3d 1343, 1349-50 (10th Cir.1998) (federal prosecution not barred by prior state acquittal); *United States v. Baptista-Rodriguez,* 17 F.3d 1354, 1360-62 (11th Cir.1994) (federal prosecution not barred by failed foreign prosecution); *United States v. Rashed,* 234 F.3d 1280 (D.C.Cir.), *cert. denied,* 533 U.S. 924, 121 S.Ct. 2539, 150 L.Ed.2d 708 (2001) (federal prosecution not barred by foreign conviction).

Angleton acknowledges that the dual sovereignty doctrine is established law, binding on this court, although he urges its reexamination. Angleton also argues that the doctrine's exceptions and limits preclude its application to this case.

III. The Limits of the Dual Sovereignty Doctrine

A. The *Bartkus* "Sham Prosecution" Exception

1. *The Applicable Legal Standards*

In *Bartkus v. Illinois,* the Court suggested, in *dicta,* that despite extensive participation by federal authorities in the successive state trial, the defendant could not reasonably claim that the state "was merely a tool of the federal authorities" or that the "state prosecution was a sham and a cover for a federal prosecution." 359 U.S. at 123, 79 S.Ct. 676. In dissent, four justices agreed with the majority's suggestion that the first sovereign to prosecute a defendant could be so heavily involved in a second prosecution as to vitiate the dual sovereignty doctrine and bar the second prosecution under double jeopardy. Angleton urges that this *Bartkus* "sham prosecution" exception to the dual sovereignty doctrine applies here because of the extensive involvement of the Houston Police Department and other state officials in this federal prosecution. The government responds by pointing out that if the *Bartkus* exception exists at all, it applies only in extraordinary circumstances that are not present here.

The facts of *Bartkus* itself demonstrate that there can be extensive involvement by the first sovereign in a second sovereign's prosecution without vitiating the application of the dual sovereignty doctrine. In *Bartkus,* the dissent described the extent of the federal authorities' involvement in the state prosecution that followed Bartkus's federal court acquittal. The federal authorities "solicited the state indictment, arranged to assure the attendance of state witnesses, unearthed additional evidence to discredit Bartkus and one of his alibi witnesses, and in general prepared and guided the state prosecution." 359 U.S. at 164-65, 79 S.Ct. 676. The FBI agents who conducted the federal investigation turned over all the evidence they had gathered to the state prosecutors. The " 'federal officers did instigate and guide this state prosecution' and 'actually prepared this case.' " *Id.* at 165, 79 S.Ct. 676 (quoting statements of Illinois's counsel at oral argument). The federal sentencing of one of the witnesses in the state case was postponed until after he testified against Bartkus at the state trial. *Id.* at 123, 79 S.Ct. 676. Despite the role of the federal authorities in instigating the successive state indictment and the extensive involvement of the federal authorities in the prosecution itself, the Supreme Court held that the record did "not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution." *Id.* at 123-24, 79 S.Ct. 676.

Since *Bartkus,* courts have considered a number of challenges to subsequent prosecutions based on the *Bartkus* sham prosecution exception to the dual sovereignty doctrine. The Fifth Circuit has considered seven such challenges.[16] In one case, the Fifth Circuit expressed skepticism as to whether the sham prosecution exception in fact existed, or could be applied. *Patterson,* 809 F.2d at 247 n. 2 ("It is unclear whether such a holding has been established by the Supreme Court."); *see also United States v. Brocksmith,* 991 F.2d 1363, 1366 (7th Cir.), *cert. denied,* 510 U.S. 999, 114 S.Ct. 569, 126 L.Ed.2d 468 (1993); *United States v. Tirrell,* 120 F.3d 670, 677 (7th Cir.1997). However, other Fifth Circuit cases assume that the exception exists. *See Moore,* 958 F.2d at 650; *Logan,* 949 F.2d at 1380 n. 16. Other circuit courts have recognized the sham prosecution exception more readily than the Fifth Circuit. *See United States v. Guzman,* 85 F.3d 823, 826 (1st Cir.1996) ("We find the gravitational pull of *Bartkus* irresistible. Indeed, we think that the exception is compelled by the bedrock principle of dual sovereignty."); *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Dr.,* 954 F.2d 29, 38 (2d Cir.1992); *In re Kunstler,* 914 F.2d 505, 517 (4th Cir.1990); *United States v. Moore,* 822 F.2d 35, 38 (8th Cir.1987); *United States v. Bernhardt,* 831 F.2d 181, 182-83 (9th Cir.1987); *United States v. Guy,* 903 F.2d 1240, 1242 (9th

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[16] *See United States v. McKinney,* 53 F.3d 664 (5th Cir.1995); *United States v. Moore,* 958 F.2d 646 (5th Cir.1992); *United States v. Logan,* 949 F.2d 1370 (5th Cir.1991); *United States v. Cooper,* 949 F.2d 737 (5th Cir.1991); *United States v. Harrison,* 918 F.2d 469 (5th Cir.1990); *United States v. Patterson,* 809 F.2d 244 (5th Cir.1987); *United States v. McRary,* 616 F.2d 181 (5th Cir.1980).

Cir.1990); *United States v. Liddy,* 542 F.2d 76, 79 (D.C.Cir.1976).

The Supreme Court recently cited *Bartkus* in discussing whether "cooperative conduct" between the United States and foreign governments could support a claim that fear of foreign prosecution triggered the Fifth Amendment privilege against self-incrimination. In *United States v. Balsys,* 524 U.S. 666, 698-99, 118 S.Ct. 2218, 141 L.Ed.2d 575 (1998), the Court held that concern with foreign prosecution was beyond the scope of the Incrimination Clause of the Fifth Amendment. However, the Court stated, in *dicta,* that it was not foreclosing the argument that "cooperative conduct between the United States and foreign nations could[ ] develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause." *Id.* at 698, 118 S.Ct. 2218. Such an argument, if it could be made, would require a defendant to show that both the United States and the foreign government had "enacted substantially similar criminal codes aimed at prosecuting offenses of international character" and that the "United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries. . . . " *Id.* at 699, 118 S.Ct. 2218. If these circumstances were demonstrated, a defendant could argue that the Fifth Amendment "should apply simply because that prosecution was not fairly characterized as distinctly 'foreign.'" *Id.* The Court noted the possibility that such a claim could be made if "cooperative conduct" between the United States and a foreign nation rose to the level that "the prosecution was as much on behalf of the United States as of the prosecuting nation, so that the division of labor between evidence gatherer and prosecutor made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself." *Id.* at 699-700, 118 S.Ct. 2218. The Court expressly stated that it was not deciding "whether such an argument should be sustained." *Id.* The Court cited *Bartkus* for the proposition that a "the mere support of one nation for the prosecutorial efforts of another does not transform the prosecution of the one into the prosecution of the other." *Id.* 79 S.Ct. at 700 (citing *Bartkus,* 359 U.S. at 122-24, 79 S.Ct. 676).

The Supreme Court in *Bartkus,* and all circuit courts to consider *Bartkus* sham prosecution claims, have held that even significant cooperation between the two sovereigns does not provide a basis for applying the *Bartkus* exception. *See, e.g., United States v. Rashed,* 234 F.3d 1280, 1284 (D.C.Cir.), *cert. denied,* 533 U.S. 924, 121 S.Ct. 2539, 150 L.Ed.2d 708 (2001); *United States v. Johnson,* 169 F.3d 1092, 1096 (8th Cir.), *cert. denied,* 528 U.S. 857, 120 S.Ct. 143, 145 L.Ed.2d 121 (1999); *United States v. Tirrell,* 120 F.3d 670, 677 (7th Cir.1997); *United States v. Certain Real Property and Premises Known as 38 Whalers Cove,* 954 F.2d 29, 38 (2d Cir.), *cert. denied,* 506 U.S. 815, 113 S.Ct. 55, 121 L.Ed.2d 24 (1992); *United States v. Davis,* 906 F.2d 829, 832-34 (2d Cir.1990); *United States v. Russotti,* 717 F.2d 27, 31 (2d Cir.1983), *cert. denied,* 465 U.S. 1022, 104 S.Ct. 1273, 79 L.Ed.2d 678 (1984); *see also United States v. Moore,* 822 F.2d 35, 38 (8th Cir.1987); *United States v. Aleman,* 609 F.2d 298, 309 (7th Cir.1979). Every circuit to consider the issue has held that the cross-designation of a state law enforcement agent or district attorney as a federal official to assist or even to conduct a federal prosecution does not bring a case within the

Bartkus exception to the dual sovereignty doctrine. *See United States v. Berry,* 164 F.3d 844, 845 (3d Cir.), *cert. denied,* 526 U.S. 1138, 119 S.Ct. 1794, 143 L.Ed.2d 1021 (1999); *United States v. Trammell,* 133 F.3d 1343, 1350 (10th Cir.1998); *United States v. Figueroa-Soto,* 938 F.2d 1015, 1019 (9th Cir.1991), *cert. denied,* 502 U.S. 1098, 112 S.Ct. 1181, 117 L.Ed.2d 424 (1992); *United States v. Paiz,* 905 F.2d 1014, 1024 (7th Cir.1990), *cert. denied,* 499 U.S. 924, 111 S.Ct. 1319, 113 L.Ed.2d 252 (1991); *United States v. Safari,* 849 F.2d 891, 893 (4th Cir.), *cert. denied,* 488 U.S. 945, 109 S.Ct. 374, 102 L.Ed.2d 363 (1988); *see also United States v. Perchitti,* 955 F.2d 674, 677 (11th Cir.1992). The courts have held that one sovereign's request that another instigate a subsequent prosecution does not trigger the *Bartkus* exception. *See, e.g., Bartkus,* 359 U.S. at 123-24, 79 S.Ct. 676; *Harrison,* 918 F.2d at 472; *Tirrell,* 120 F.3d at 677; *Rashed,* 234 F.3d at 1283-84.

The courts have struggled to articulate when cooperation between successively prosecuting governments does rise to a level that makes the *Bartkus* exception apply. A number of courts have suggested that the exception applies only when one sovereign has essentially manipulated another sovereign into prosecuting. *See Whalers Cove,* 954 F.2d at 38 (suggesting that one sovereign "must have effectively manipulated the actions of the [other sovereign] so that [its] officials retained little or no independent volition."); *Guzman,* 85 F.3d at 827 (exception limited to situations in which one sovereign "thoroughly dominates or manipulates the prosecutorial machinery of another"); *accord Rashed,* 234 F.3d at 1283; *Baptista-Rodriguez,* 17 F.3d at 1361; *Kunstler,* 914 F.2d at 517; *Liddy,* 542 F.2d at 79.

These standards are applied to the facts disclosed by the present record.

2. *Analysis*

The Fifth Circuit has established a procedure to follow when a defendant invokes the sham prosecution exception. In the most recent Fifth Circuit case on the issue, the court explained:

> When a defendant claims collusion between federal and state law enforcement officials, the defendant has the burden of producing evidence to show a *prima facie* double jeopardy claim. Once a *prima facie* case is shown, the burden of persuasion shifts to the government.

McKinney, 53 F.3d at 676 (citing *Cooper,* 949 F.2d at 750-51); *see Stricklin,* 591 F.2d at 1117-18 (developing procedure for double jeopardy claims); *Patterson,* 809 F.2d at 247-48 (applying *Stricklin* procedure to claims of collusion under *Bartkus*); *Harrison,* 918 F.2d at 474-75 (same); *see also United States v. Doyle,* 121 F.3d 1078, 1089 (7th Cir.1997); *Guzman,* 85 F.3d at 830; *United States v. Benefield,* 874 F.2d 1503, 1505 (11th Cir.1989) (all applying a similar procedure for double jeopardy claims). This court held a hearing under this procedure.[17]

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[17] Before the hearing, Angleton filed a motion requesting discovery under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *United States v. Agurs,* 424 U.S. 953, 96 S.Ct. 1426, 47 L.Ed.2d 358 (1976), seeking evidence regarding the cooperation between the federal and state authorities in this case. (Docket Entry No. 40). The government opposed six of the eleven requests for discovery relating to the extent of the state and federal cooperation as

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The facts on which Angleton relies include the following:

- The federal government showed no interest in investigating Angleton on any federal charges until after Angleton's state acquittal, when state officials cooperated with the federal investigation into suspected money laundering, RICO, and income tax evasion.
- The United States Attorney's Office did not investigate Angleton for suspected federal murder for hire until after the Harris County District Attorney's Office requested it to do so.
- The FBI did not investigate Angleton for the murder of Doris Angleton until after state authorities had asked the United States Attorney's Office to extend the investigation.
- The failure of the state prosecution led first to the FBI's investigation of Angleton's activities

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unjustified under *Stricklin,* 591 F.2d at 1117, and not otherwise permitted by Federal Rule of Criminal Procedure 16 and related case law. Under *Stricklin,* 591 F.2d at 1117, a defendant is not entitled to additional discovery to assist in establishing a *prima facie* case of double jeopardy. "Material which is presently unavailable to the defendant through discovery or any other means is not made more accessible by our holding in this case." *Id.; see also Harrison,* 918 F.2d at 475 (applying the *Stricklin* procedure to claim of double jeopardy based on the *Bartkus* sham prosecution exception). This court denied Angleton's discovery request. However, the government provided responsive information as to a number of the items requested on the record in open court. The testimony of Special Agent Rosenthal provided Angleton with extensive information as to the state's involvement in requesting the federal investigation and participating in that investigation and prosecution.

that had a clear federal nexus, including suspected money laundering. When the attempt to indict Angleton for these offenses failed, a joint federal-state task force, consisting of the original state law enforcement investigators and an FBI agent with close ties to the Harris County District Attorney's office,[18] was formed with the sole purpose of prosecuting Angleton for murder for hire.

- The three and one-half years that elapsed between the state acquittal and the federal indictment points to a lack of independent federal interest.
- The Houston Police Department detectives who investigated Angleton for the state trial and testified in that trial have been deputized as federal deputy marshals for the Angleton federal investigation, although they continue to be paid by the City of Houston.
- The state prosecutors have provided the federal investigators and prosecutors with full access to all the information and evidence developed for the state prosecution.
- The investigation by the joint task force has yielded very little new evidence.
- The federal authorities interviewed the jurors from the state trial in efforts to improve their

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[18] Special Agent Rosenthal is the wife of Charles A. Rosenthal, Jr., who, at the time of Angleton's prosecution, was chief of the felony division of the Harris County District Attorney's office. Charles Rosenthal was elected as the District Attorney for Harris County, Texas in November 2000.

prosecutorial strategy for this second prosecution.

- The only witness to testify before the federal grand jury that indicted Angleton for murder for hire was an FBI agent who led the joint federal/state task force, and who is married to the Harris County District Attorney.

The Fifth Circuit has consistently rejected arguments of sham prosecution based on cooperation between successively prosecuting sovereigns. However, the Fifth Circuit has only considered seven cases raising the *Bartkus* sham prosecution exception, and the facts did not fairly raise the issue.

The Fifth Circuit first considered the *Bartkus* exception in *United States v. McRary,* 616 F.2d 181 (5th Cir.1980). In that case, the defendant and his wife hijacked a boat and forced the captain to take them to Cuba. The defendant was convicted in Cuba for an unknown crime. The record contained one communication from the United States State Department stating that the "Cuban authorities have decided to turn the [defendant and his wife] over to the competent courts, to be tried in accordance with Cuban law. . . . " *Id.* at 182. Four years later, the defendant returned to the United States, where he was indicted in federal court and convicted of kidnaping. On appeal, the defendant suggested that the "successive prosecutions should be treated as if they were obtained by the same sovereign." *Id.* at 185. There was scant evidence of any contact, much less cooperation, between the two sovereigns. The court held that the defendant made no showing that the Cuban prosecution was a "tool" of or a "sham and a cover for the federal prosecution." *Id.* (citing *Bartkus,* 359 U.S. at 123-24, 79 S.Ct. 676).[19]

The Fifth Circuit next considered a *Bartkus*-sham prosecution claim in a case involving a police shooting, *United States v. Patterson,* 809 F.2d 244, 245 (5th Cir.1987). One of the officers, Patterson, was tried and acquitted on state charges of attempted murder. The other officer, Brasher, was convicted in state court of aggravated perjury. *Id.* In a subsequent federal prosecution, Patterson was convicted of depriving the shooting victim of due process and of conspiring to violate the victim's civil rights, in violation of 18 U.S.C. §§ 241 and 242. Brasher was convicted as an accessory after the fact for making false statements about the shooting and for conspiracy to violate the victim's rights, in violation of 18 U.S.C. § 241. *Id.* at 246. The defendants argued that the federal prosecution was barred by collusion between the state and federal authorities, but presented only "unsubstantiated allegations" and no evidence other than a showing of "some cooperation between the prosecutors," which was insufficient. *Id.* The district court ruled that the defendants had failed to establish a *prima facie* case of collusion under *Bartkus,* and the Fifth Circuit affirmed.[20]

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[19] McRary also failed to introduce any evidence regarding his conviction in Cuba. *Id.* at 123, 79 S.Ct. 676. The court did not have to rely on the dual sovereignty exception because McRary failed to establish a *prima facie* case that the successive prosecutions were for the same offense, as required by *Blockburger.*

[20] Although the court did not address the issue, the defendants' double jeopardy claim in *Patterson* would fail, even if they established the *Bartkus* exception, because attempted murder and aggravated

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In *United States v. Harrison,* 918 F.2d 469 (5th Cir.1990), the court considered a double jeopardy challenge to a federal conviction that followed a state conviction on lesser included charges arising from the same conduct. In 1982, state law enforcement authorities arrested Harrison and another individual on state drug charges following a drug surveillance operation conducted by county sheriff's officers. *Id.* at 471. The United States Customs officers were notified of the arrests, but took no steps to pursue federal involvement in the case. Harrison pleaded guilty to the state possession charges. In late 1984, the sheriff met with federal authorities and asked them to pursue federal charges against Harrison. Three years later, the United States Customs Service opened a file on the incident. A federal investigation began in May 1987. There was no evidence of state involvement in the federal investigation. Harrison was indicted for, and entered a conditional guilty plea to, federal drug charges arising from the same incident that formed the basis of his state conviction. Harrison argued that the federal prosecution was barred because it was a "sham," allowing state authorities to reprosecute him for the same offense. *Id.* at 475. The Fifth Circuit upheld the district court's ruling that there was no evidence of collusion between the state and federal authorities that prevented the successive prosecution by the federal government. *Id.*

In two cases decided in December 1991, the Fifth Circuit again rejected claims of collusion under *Bartkus.* In *United States v. Cooper,* 949 F.2d 737, 750-51 (5th

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perjury under Texas law and violations of 18 U.S.C. §§ 241 and 242 are not the "same offense" under *Blockburger,* 284 U.S. at 300, 52 S.Ct. 180.

Cir.1991), the defendant was convicted of robbery in state court and subsequently convicted on a federal charge of unlawful possession of an unregistered firearm. Both charges grew out of Cooper's arrest by state law enforcement officials for aggravated robbery of a convenience store. *Id.* at 740. A sawed-off shotgun had been found in Cooper's vehicle. A federal agent interviewed Cooper in the state jail, but no federal charges were filed. Cooper was convicted on the state robbery charge and sentenced to prison. State officials mistakenly released him that same year. *Id.* A few weeks later the federal government indicted Cooper on a federal charge of unlawful possession of an unregistered firearm. *Id.* at 741. Cooper argued that the federal prosecutors had indicted him in order to help state authorities locate and reapprehend him after their mistake in releasing him from state prison. *Id.* at 751. The Fifth Circuit affirmed his conviction. The only evidence of "collusion" Cooper presented was the close timing between his mistaken release from state custody and his subsequent federal indictment. The court held this insufficient for a *prima facie* showing of collusion. *Id.* at 751. The court also noted that the federal government demonstrated its independent interest in prosecuting Cooper by proceeding with the federal prosecution even after Cooper was reapprehended by the state. *Id.* In addition, the court noted that the federal government's interest in Cooper predated his release from jail, although that interest was limited to a single interview by a federal agent. *Id.*[21]

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[21] The *Cooper* court also considered the argument that federal charges were barred by the double jeopardy clause under *Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), which

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In *United States v. Logan,* 949 F.2d 1370 (5th Cir.1991), decided one week after *Cooper,* the Fifth Circuit considered and dismissed the defendant's double jeopardy claim in a footnote. Following an investigation that appears to have been conducted primarily, if not solely, by state police officers, Stanley pleaded guilty to state marijuana possession charges.[22] Stanley was subsequently indicted on federal charges of conspiracy to distribute cocaine and marijuana and moved to dismiss on the basis of double jeopardy. On appeal following his conviction, the Fifth Circuit noted that although the dual sovereignty doctrine is "limited by the qualification that one sovereign's prosecution may not be used as a disguise for another sovereign's prosecution," Stanley had failed to introduce any evidence to show that the successive federal prosecution was a "sham." *Id.* at 1380 n. 16.

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altered the *Blockburger* test by making jeopardy apply to the same conduct rather than to the same elements of the offense. *Grady,* however, was overruled three years later in *United States v. Dixon,* 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), and the traditional *Blockburger* analysis restored as the standard for determining when subsequent charges constituted the same offense. Under *Blockburger,* the state charge of aggravated robbery and the federal charge of unlawful possession of an unregistered firearm are not the same offense. As in *McRary* and *Patterson,* the *Cooper* court did not have to rely on the dual sovereignty exception to permit the successive federal prosecution.

[22] The law enforcement officers who primarily conducted the investigation were an agent of the Mississippi Bureau of Narcotics and another individual described as "Sergeant McVey" or "officer McVey." *Id.* at 1372, 1376 n. 9. It appears that FBI agents were also involved because the investigation ranged across Mississippi, Alabama and Florida; Logan was arrested in Mississippi, while Stanley was arrested in Florida. *Id.* at 1373.

In *United States v. Moore,* 958 F.2d 646, 650 (5th Cir.1992), the defendant fired on state and federal agents executing a search warrant at a suspected crack house. *Id.* at 648. Moore was charged under Texas law with shooting a police officer, but convicted of a lesser included offense. *Id.* at 650 n. 3. Moore was then indicted for, and convicted on, federal charges of assaulting a federal officer with a deadly weapon and using a firearm in the commission of a predicate felony. On appeal, Moore argued that the federal prosecution was a tool of the state prosecution "because the state essentially 'lost' the first case against him." *Id.* at 650. The Fifth Circuit held that, even if Moore had raised the issue before the trial court, "it is clear that defendant committed two separate and independent acts, one against a state officer and one against a federal officer" making double jeopardy inapplicable. *Id.* at 650.

In the Fifth Circuit's most recent case on the *Bartkus* exception, *United States v. McKinney,* 53 F.3d 664, 676 (5th Cir.1995), the court considered a challenge to a federal prosecution for conspiracy to distribute narcotics that followed a state prosecution and guilty plea to state charges of violating an organized crime statute. Both charges arose from the same conduct.[23] *Id.* at 676. One of the defendants, Allen, alleged that the state investigating officers had failed to include certain additional charges in the state prosecution, which were not incorporated in the state plea bargain. Allen alleged that the state law enforcement officers later reported the additional crimes to federal officials, "manipulating the system." *Id.* The federal district court heard the federal prosecutor describe "the decision making process which preceded the federal indictment" and determined that Allen had not shown a *prima facie* case of collusion between the federal and state governments. *Id.* The Fifth Circuit affirmed. *Id.*

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[23] Although the Fifth Circuit did not address the point, the federal and state charges were not the "same offense" under *Blockburger.* The state and federal offenses each contain an element not contained in the other and, thus, would not constitute double jeopardy even if charged in succession by the same sovereign.

Angleton observes that each of the Fifth Circuit cases involved a lesser degree of one sovereign's involvement in a second sovereign's prosecution than is present in this case. However, the Fifth Circuit has considered cases involving some of the factors on which Angleton relies to support his sham prosecution argument. The Fifth Circuit has held that an extended delay between the first and second prosecutions and the absence of interest by federal officials until after a prior state prosecution ended did not raise an inference of collusion. *Harrison,* 918 F.2d at 472, 475. The Fifth Circuit, with other circuits, as well as the Supreme Court in *Bartkus* itself, have consistently rejected arguments that one sovereign's instigation of a another sovereign's successive prosecution creates an inference of collusion. *Bartkus,* 359 U.S. at 123-24, 79 S.Ct. 676; *Harrison,* 918 F.2d at 472; *Tirrell,* 120 F.3d at 677; *Rashed,* 234 F.3d at 1283-84. Courts in other circuits have consistently rejected arguments that the deputizing or cross-designating law enforcement agents or prosecutors who worked on the first prosecution to assist or conduct a second prosecution is a basis for the *Bartkus* exception. *Figueroa-Soto,* 938 F.2d at 1019; *Paiz,* 905 F.2d at 1024; *United States v. Raymer,* 941 F.2d 1031, 1037 (10th Cir.1991). Courts have consistently rejected arguments that the delivery by the government that conducted the first prosecution of all evidence and information to the government conducting the second prosecution is a basis for an inference of a sham prosecution. *See United States v. Koon,* 34 F.3d 1416, 1439 (9th Cir.1994), *rev'd in part on other grounds,* 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996); *Figueroa-Soto,* 938 F.2d at 1018-19; *Baptista-Rodriguez,* 17 F.3d at 1361; *Rashed,* 234 F.3d at 1284.

There are only two reported cases in which circuit courts have remanded a case to the district court for further fact-finding on the applicability of the *Bartkus* exception. *See United States v. All Assets of G.P.S. Automotive Corp.,* 66 F.3d 483, 496 (2d Cir.1995); *United States v. Bernhardt,* 831 F.2d 181, 183 (9th Cir.1987). In *G.P.S. Automotive,* the owner of a [sic] automotive salvage yard was convicted in New York state court of possession of stolen property, illegal possession of vehicle identification numbers, and falsifying business records. Following the state conviction, the federal government brought an *in rem* civil forfeiture action seeking the assets of the business based on alleged violations of the federal statutes prohibiting trafficking in vehicles or parts with tampered numbers and money laundering. The district court held that the dual sovereignty doctrine permitted the subsequent federal forfeiture action. The Second Circuit remanded for further fact-finding on the *Bartkus* exception. The court noted that the

> Suffolk County District Attorney's Office referred this case to the U.S. Attorney in the first instance, that much of the evidence used in the federal forfeiture action was developed in connection with their state criminal proceedings, and that the Suffolk County district attorney was cross-designated as a Special Assistant U.S.

> Attorney for the purpose of prosecuting the federal forfeiture action against GPS and the Schaffers.

Id. at 494. The court noted that these facts did not establish the "narrow exception to the dual sovereignty doctrine." *Id.* at 495. However, the defendants also provided evidence that the state would receive a very large percentage of any federal forfeiture proceeds. *Id.* at 496. The court concluded that if, on remand, the evidence demonstrated that state would receive "all, or a disproportionate share, of the forfeiture proceeds," that "the federal forfeiture was essentially instigated by the state," and that it was "conducted almost exclusively by state officials from state offices," then the *Bartkus* exception would be "strongly implicated." *Id.* No subsequent rulings in the case are reported. No similar facts regarding forfeiture of assets are suggested in the present record.

The Ninth Circuit has also remanded a case for further fact-finding as to the *Bartkus* sham prosecution exception. In *United States v. All Assets Of G.P.S. Automotive Corp.*, 66 F.3d 483 (9th Cir.1995), the district court dismissed the indictment based on *Bartkus* and the Ninth Circuit remanded. The Bernhardts were originally charged by the State of Hawaii for conspiracy and misapplication of bank funds. The state indictment was dismissed as barred by limitations. The state prosecutor then asked the United States Attorney's Office in Hawaii to initiate a federal prosecution. There had been no prior federal connection with the case. The state prosecutor became the lead attorney for the federal case as a special assistant United States Attorney, although the state continued to pay his salary. The Ninth Circuit reversed the district court's decision to dismiss, stating that "[i]t is clear the

Bartkus exception does not bar cooperation between prosecuting sovereigns." *Id.* at 182, 79 S.Ct. 676 (citing *Moore,* 822 F.2d at 38). The court agreed with the district court that "these circumstances are troubling," but that "sufficient independent federal involvement would save the prosecutions from [the *Bartkus*] exception." *Id.* at 183, 79 S.Ct. 676. The Ninth Circuit remanded to the district court to determine the extent of independent federal involvement in the successive prosecution. *Id.*

There is only one published, unreversed decision in which a district court dismissed an indictment in a successive prosecution based on *Bartkus.* In *United States v. Belcher,* 762 F.Supp. 666, 671 (W.D.Va.1991), a federal indictment followed the dismissal of state indictments. In that case, the state prosecutor and the assistant United States Attorney was the same person. The federal district court found that the simultaneous state and federal power possessed by the single prosecutor occupying both state and federal roles led to the conclusion that the second prosecution was a sham for the first, unsuccessful prosecution. *Id.* No appeal is reported. No similar facts are present in this case.

Angleton acknowledges that cooperation between state and federal law enforcement does not ordinarily create "collusion" and is encouraged by the courts. *See Bartkus,* 359 U.S. at 123-124, 79 S.Ct. 676; *United States v. Marek,* 238 F.3d 310, 323 (5th Cir.2001). Angleton argues that no Fifth Circuit case considering a *Bartkus* sham prosecution argument has involved an investigation conducted solely by the first prosecution's law enforcement officers followed by a joint investigation by a specially formed federal-state task force, including the same state law enforcement officers. The government has not cited such a case. However, as noted above, the reported cases address close involvement by the government officers and agents involved in a first prosecution with a successive prosecution, similar in many respects to the level of cooperation between the state police officers and district attorneys on the one hand and the federal investigators and Assistant United States Attorneys on the other. *Bartkus,* 390 U.S. at 123-24; *Figueroa-Soto,* 938 F.2d at 1019.

The record is clear that the United States Attorney's Office for the Southern District of Texas sought permission from the United States Justice Department before deciding to seek a federal murder for hire indictment against Angleton. Assistant United States Attorneys have vigorously pursued this prosecution. They, not state prosecutors, are prosecuting the case. There is no basis to conclude that the state officials "so effectively manipulated the actions of the [United States] so that [its] officials retained little or no independent volition" in deciding to prosecute and in pursuing the prosecution. *United States v. 38 Whalers Cove,* 954 F.2d at 38; *Liddy,* 542 F.2d at 79; *Baptista-Rodriguez,* 17 F.3d at 1361; *Rashed,* 234 F.3d at 1283. The facts do not support an inference of collusion that would bring this case within the *Bartkus* exception to the dual sovereignty doctrine as it has been applied by the courts.

Angleton's argument as to federal and state cooperation in this federal prosecution is less one of collusion and more an argument that there is no separate or compelling federal interest. Angleton's argument is not so much that the state government colluded with the federal government so that the state could in effect reprosecute him, but rather that the federal government has an insufficient federal interest in this prosecution to warrant the application of the dual sovereignty exception to the double jeopardy protection. (Docket Entry No. 38, at 21-37). Angleton frames this argument in several ways. He argues that the federal government cannot base a successive prosecution on an incorporated state statute, citing *Houston v. Moore,* 18 U.S. (5 Wheat.) 1, 5 L.Ed. 19 (1820). He also argues that collateral estoppel precludes this prosecution. Finally, Angleton argues that the government's decision to pursue this successive prosecution strains the limits of the Double Jeopardy and Commerce Clauses. This court now turns to these arguments.

B. Federal Incorporation of a State Statute

Angleton argues that because section 1958 incorporates and derivatively enforces the Texas murder statute, the federal government has no independent, federal interest in prosecuting him and is not a separate sovereign for the purpose of the dual sovereignty doctrine. Angleton bases his argument on a Supreme Court case decided before the Civil War, *Houston v. Moore,* 18 U.S. (5 Wheat.) 1, 5 L.Ed. 19 (1820). *Houston* did not involve successive prosecutions. In that case, the Court reviewed the constitutionality of a Pennsylvania court martial proceeding that convicted a member of the state militia for failing to answer the president's call to service. The Pennsylvania military tribunal convicted Houston under a state law punishing conduct that federal law also addressed.[24]

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[24] The Pennsylvania statute in question provided: That if any commissioned officer of the militia, shall have neglected or refused to

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serve when called into actual service, in pursuance of any order or requisition of the President of the United States, he shall be liable to the penalties defined in the act of the congress of the United States, passed on the twenty-eighty [sic] day of February, one thousand seven hundred and ninety-five: *that is to say,* Each and every officer having so offended, shall forfeit a sum not exceeding one year's pay nor less than one month's pay, to be determined and adjudged by a court martial; and shall, moreover, be liable to be cashiered by sentence of a court martial, and to be incapacitated from holding a commission in the militia for a term not exceeding twelve months, as the discretion of said court; or shall be liable to any penalty which may have been prescribed since the date of the passage of the said act, or which may hereafter be prescribed by any law of the United States.

Acts of the General Assembly of the Commonwealth of Pennsylvania 1813-1814, Act of March 28, 1814, § 21 (emphasis in original). The next paragraph of the Pennsylvania statute provided that:

> Each and every non-commissioned officer and private of the militia who shall have neglected to serve when called into actual service, in pursuance to an order or requisition of the president of the United States, shall be liable to the penalties defined in the act of the congress of the United States, passed the twenty-eighth of February, one thousand seven hundred and ninety-five: *that is to say,* Each and every non-commissioned officer or private having so offended, shall forfeit a sum not exceeding one year's pay nor less than one month's pay, to be determined and adjudged by a court martial and shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged, for one calendar month for every five dollars of such fine, or to any penalty which may have been prescribed since the date of the passage of said act, or which may hereafter be prescribed by any law of the United States.

Id. (emphasis in original). The Pennsylvania statute provided that a state court martial shall try those accused under the statute. *Id.* The president of the state court martial

> shall furnish to the marshal of the United States, or to his deputy, and also the comptroller of the treasury of the United States, a list of the delinquents fined, in order that the further proceedings directed to be had thereon by the laws of the United States, may be completed.

Id.

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Houston was tried by the Pennsylvania court martial, found guilty, and sentenced to pay a fine. *Id.* When the United States deputy marshal for the district levied on his property, as provided under the federal statute, Houston brought an action for trespass in the state court against the deputy marshal. At trial, Houston argued that the Pennsylvania statute under which he was convicted was contrary to the Constitution of the United States. *Id.* 18 U.S. (5 Wheat.) at 4. The jury found for the deputy marshal and the Pennsylvania Supreme Court affirmed the verdict.

Section 5 of the Act of the United States Congress passed on February 28, 1795, provided:

> That every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the President of the United States, in any of the cases before recited, shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court martial; and such officer shall, moreover, be liable to be cashiered by sentence of a court martial, and be incapacitated from holding a commission in the militia, for a term not exceeding twelve months, at the discretion of said court: And such non-commissioned officers and privates shall be liable to be imprisoned, by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month, for every five dollars of such fine.

Act of February 28, 1795, § 5, 1 Stat. 424. The Act also provides that the "courts martial for the trial of the militia shall be composed of militia officers only" and the fines assessed are to be certified by the presiding officer to the marshal of the district. *Id.* §§ 6-7. The marshal or his deputy "shall forthwith proceed to levy the said fines with costs, by distress and sale of the goods and chattels of the delinquent. . . . " and shall pay the fines to the "supervisor of the revenue in the district in which they are collected." *Id.* §§ 7-8.

Before the United States Supreme Court, Houston argued that the Pennsylvania statute was unconstitutional because Congress retained the exclusive power to regulate the militia. *Id.* at 5. In support of his position, Houston contended that if the state had concurrent jurisdiction to regulate the militia, a conviction by the state court would either "oust the jurisdiction of the United States' Court Martial, or might subject the accused to be twice tried for the same offense." *Id.* at 31. The Court concluded that the state statute conferred "authority upon a State Court Martial to enforce the laws of the United States against delinquent militia men." *Id.* at 32. The state had provided jurisdiction to its military tribunal to apply and enforce federal law. In response to Houston's argument regarding double jeopardy, the Court stated:

> if the jurisdiction of the two Courts be concurrent, the sentence of either Court, either of conviction of acquittal, might be pleaded in bar of the prosecution of the other, as much so as the judgment of a State Court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a Circuit Court of the United States.

Id. at 31. Justice Story dissented, arguing that Congress was given the exclusive power under the Constitution to regulate the militia. Foreshadowing Justice Black's future dissents in ***Bartkus*** and ***Abbate,*** Justice Story argued that the dual sovereigns of federal and state governments created by our federal system dictated avoiding concurrent jurisdiction:

> In a government formed like ours, where there is a division of sovereignty, and, of course, where there is a danger of collision from the near

> approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws in its own tribunals.

Id. at 69. In support of his argument, Justice Story noted the effect of allowing concurrent jurisdiction under the statutes in question:

> In the first place, if the trial in the State Court Martial be on the merits, and end in a condemnation or acquittal, one of two things must follow, either that the United States' Courts Martial are thereby divested of their authority to try the same case, in violation of the jurisdiction confided to them by Congress; or the delinquents are liable to be twice tried and punished for the same offence, against the manifest intent of the act of Congress, the principles of common law, and the genius of our free government.

Id. at 72 (Story, J., dissenting). However, Justice Johnson rejected the suggestion that successive prosecutions by separate sovereigns were improper, stating in his concurrence: "Why may not the same offence be made punishable both under the laws of the states and the laws of the United States? Every citizen of a state owes a double allegiance. . . . " *Id.* at 33 (Johnson, J., concurring).

Houston v. Moore has been cited for numerous propositions.[25] Of primary importance to Angleton's argument is

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[25] *See, e.g., Ex Parte Milligan,* 71 U.S. (4 Wall) 2, 44 n. 31 (1866) (citing *Houston v. Moore* as supporting the position that a person is not subject to a United States Court Martial until he has gone to the place of rendezvous and been enrolled and mustered into the national militia); *State of California v. Zook,* 336 U.S. 725, 750 n. 13, 69 S.Ct.

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the citation to *Houston v. Moore* in *Bartkus,* 359 U.S. at 130, 79 S.Ct. 676. The *Bartkus* Court observed that two state court decisions had misinterpreted *Houston v. Moore* to preclude successive prosecutions by state and federal governments. The Court noted that the majority's statement in *Houston v. Moore* was limited by the conclusion that "the state statute imposed state sanctions for violation of a federal criminal law"; in such a case, the "two trials would not be of similar crimes arising out of the same conduct; they would be for the same crime." *Id.* The Court concluded that *Houston v. Moore* "can be cited only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question." *Id.* Angleton contends that this is that rare case.

Angleton's argument is that section 1958 incorporates *in haec verba* the Texas capital murder statute under which he was previously acquitted. Section 1958 requires that the defendant travel in or use facilities of interstate commerce "with intent that murder be committed in violation of the laws of any State. . . . " Angleton contends that the principal element of both section 1958 and Texas

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841, 93 L.Ed. 1005 (1949) (citing *Houston v. Moore* as holding that where Congress has exercised its power, the states may not add to the provisions of Congress); *United States v. Wheeler,* 435 U.S. 313, 317 n. 7, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (citing *Houston v. Moore* as having noted "the problems arising from concurrent federal and state criminal jurisdiction"); *United States v. Emerson,* 270 F.3d 203, 249 n. 57 (5th Cir.2001) (citing *Houston v. Moore* as holding that the states retain the power to organize, train, and regulate militia consistent with federal law).

Penal Code § 19.03 is a violation of Texas law that both the federal and state governments are empowered to enforce. Because section 1958 refers to state law to define an element of the offense, Angleton argues that the federal government is not pursuing a federal crime, but is merely attempting to enforce the Texas statute a second time. In support of this argument, Angleton points out that the only distinguishing element between the two statutes is the interstate commerce "jurisdictional hook" contained in section 1958. He argues that the addition of this federal jurisdictional hook cannot properly convert the state offense into a federal crime.

Angleton cites no case in which this specific argument formed the basis for dismissing a successive indictment.[26] *But cf. United States v. Mason,* 213 U.S. 115, 29 S.Ct. 480, 53 L.Ed. 725 (1909) (barring federal prosecution for conspiracy based on acquitted state crimes where conspiracy charge sought to impose the punishment imposed by state law for the acquitted crimes, but not citing *Houston v. Moore*). The government responds that the inclusion of the language "the laws of any State" in section 1958 does not incorporate the Texas capital murder statute. The government points to cases decided under the RICO statute and the Travel Act, which both refer to violations of state law as elements of the federal offense. *See United States v. Frumento,* 563 F.2d 1083, 1086 (3d Cir.1977)

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[26] One explanation for the lack of applicable precedent is identified by a law review article on the dual sovereignty doctrine, noting that "[o]ne should not attempt to enlist Houston's narrow holding or muddled rationale in any legal argument." Braun, *Praying to False Sovereigns,* 20 AM.J.CRIM.L. at 9.

(federal RICO prosecution not barred by state court acquittals for acts charged as predicate offenses); *United States v. Licavoli,* 725 F.2d 1040, 1047 (6th Cir.1984) (same); *United States v. Cerone,* 452 F.2d 274, 286 (7th Cir.1971) (Travel Act punishes use of facilities in interstate commerce in furtherance of violations of state statutes rather than substantive violations of the state statutes; state law "serves merely a definitional purpose").

Unlike the state legislation conferring authority on the state court martial at issue in *Houston v. Moore,* section 1958 does not, by its terms, empower a federal court to try a case under Texas Penal Code § 19.03. Although the elements to be proved at trial under each statute are the same, except for the jurisdictional element – which is why the double jeopardy issue arises in the first place – section 1958 does not incorporate Texas Penal Code § 19.03 to the same extent, or in the same manner, as the Pennsylvania statute incorporated the Congressional Act of February 28, 1795.

The Pennsylvania statute specifically referenced the federal act of February 28, 1795 and provided for precisely the same penalties. The fines imposed under the Pennsylvania statute were referred to the United States marshal for "further proceedings directed to be had thereon by the laws of the United States." Acts of the General Assembly of the Commonwealth of Pennsylvania 1813-1814, Act of March 28, 1814, § 21. Militiaman Houston was fined by the state tribunal, but under the federal statute. The fines were levied by the United States marshal, to be paid to the United States supervisor of revenue for the district. Act of February 28, 1975, § 8. The Pennsylvania statute punished the defendant for the identical conduct proscribed and defined by the federal statute, imposed penalties under the federal statute, and provided that fines collected under the state statute would be paid to the federal government. Section 1958 and Texas Penal Code § 19.03 do not have this same relationship.

Section 1958 punishes the defendant for the same conduct as Texas Penal Code § 19.03, with the additional elements necessary to invoke federal jurisdiction, but does not impose penalties under Texas law by the Texas government. Section 1958 does not incorporate Texas Penal Code § 19.03 such that an acquittal under section 19.03 could bar a prosecution under section 1958.

C. The Role of Collateral Estoppel

Angleton argues that elements essential to the federal murder for hire charges against him were actually litigated and necessarily determined in the state capital murder trial, and that collateral estoppel precludes relitigation. The Supreme Court has stated that the principle of collateral estoppel in criminal cases is embodied in the Fifth Amendment's proscription against double jeopardy. *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443, 90 S.Ct. 1189. Collateral estoppel will normally bar a successive prosecution "if one of the facts necessarily determined in the former trial is an essential element in a subsequent prosecution." *United States v. Brackett,* 113 F.3d 1396, 1398 (5th Cir.1997). The Fifth Circuit has rejected "'attempts to erect a due process basis, independent of the double jeopardy clause, for the application of collateral estoppel'" in criminal cases. *Nichols v. Scott,* 69 F.3d 1255, 1268 (5th Cir.1995) (quoting *Showery v. Samaniego,* 814 F.2d 200, 203 (5th Cir.1987)).

The parties do not dispute that both section 1958 and Texas Penal Code § 19.03 require proof of intent to commit murder and that the element of intent was necessarily determined by the state court acquittal. (Docket Entry No. 38, at 17; Docket Entry No. 51, at 9-10). The issue presented by Angleton's argument is whether the State of Texas and the federal government are the "same party" for the purpose of collateral estoppel.

The parties dispute the standard to be applied in determining whether the federal government is the "same party" as the State of Texas and barred from prosecuting Angleton for murder for hire. Angleton argues that the mutuality of interest between the state government in the first prosecution and the federal government in the second prosecution satisfies the "same party" requirement for collateral estoppel. In support of his argument, Angleton cites *dicta* in *Ashe v. Swenson* indicating that "same party" is defined as broadly in criminal cases as in civil matters. (Docket Entry No. 38, at 18) (citing *Ashe,* 397 U.S. at 443, 90 S.Ct. 1189). However, *Ashe* dealt with successive prosecutions by the same government; the dual sovereignty doctrine did not apply. The issues in *Ashe* were whether collateral estoppel is part of the Fifth Amendment's guarantee against double jeopardy and whether the jury in a prior prosecution necessarily determined a fact at issue in a second prosecution by the same party. *Ashe,* 397 U.S. at 444-47, 90 S.Ct. 1189. *Ashe* does not control the "same party" issue in this case.

The government responds that because collateral estoppel is applied to implement double jeopardy, the dual sovereignty doctrine governs the "same party" determination. The government asserts that since the state and federal governments are separate sovereigns, they are separate parties. The Fifth Circuit has held that "[c]ollateral estoppel does not apply to successive prosecutions by the state and federal governments because the party that the defendant seeks to estop in the second prosecution was not a party to the first trial." *United States v. Hayes,* 589 F.2d 811, 819 (1979). In *Hayes,* the defendant was acquitted of capital murder under Texas law, then indicted under federal law for violating the civil rights of the victim. Hayes argued that the federal prosecution should be collaterally estopped due to the prior state acquittal. The court disagreed. *Id.* However, Hayes did not argue that the federal and state prosecutors were in privity or had mutuality of interests, so as to make them the same party for collateral estoppel purposes.

Three circuit courts have considered the standard that applies in determining whether a separate sovereign should be bound by a prior criminal prosecution under *Ashe.* In *United States v. Davis,* 906 F.2d 829, 832-34 (2d Cir.1990), the court considered whether a federal prosecution was bound by a state court's ruling suppressing drug evidence in a case against the same defendants arising from the same conduct. The defendant argued that the federal prosecution should be collaterally estopped because of the close relationship between the federal and state investigations, which were conducted by an organized joint task force targeting the drug trade in that area. The court recognized that, under *Ashe,* collateral estoppel could bar further litigation of an issue decided in a criminal defendant's favor. *Id.* at 833 (citing *Ashe,* 397 U.S. 436, 90 S.Ct. 1189). However, because *Ashe* rested on the Fifth Amendment's Double Jeopardy Clause, the dual sovereignty doctrine applied and required recognition of the federal and state governments as separate parties for the purpose of collateral estoppel. *Id.* The Second Circuit then proceeded to analyze whether the Due Process Clause alone required the application of collateral estoppel, an argument the Fifth Circuit has rejected. *See Nichols,* 69 F.3d at 1268. The court considered the *Bartkus* sham prosecution analysis and determined that the evidence did not show even active participation by the federal prosecution in the state court proceeding. *Davis,* 906 F.2d at 835.

The Eighth Circuit has also considered a collateral estoppel challenge under *Ashe.* In *United States v. Garner,* 32 F.3d 1305, 1311 (8th Cir.1994), the defendant was charged in state court with robbery and with being an "armed criminal" based on his use of a gun in committing the robbery. Garner pleaded guilty to a lesser included offense; the armed criminal charge was dismissed with prejudice. He was then convicted on a federal charge of being a felon in possession of a firearm. On appeal, Garner urged that under the *Bartkus* sham prosecution exception to the dual sovereignty doctrine, the federal and state governments should be viewed as the same party. If collateral estoppel applied, the state court's dismissal of the armed criminal charge would preclude the federal government from pursuing the felon in possession prosecution. Garner did not argue for the application of a lower standard to establish privity or mutuality of interests. The court rejected Garner's argument. *Id.* at 1311.

In *United States v. Tirrell,* 120 F.3d 670, 677 (7th Cir.1997), the court considered a claim that a state prosecution for armed robbery, armed violence, and unlawful use of a firearm collaterally estopped a subsequent federal prosecution of the defendant as a felon in possession of a firearm. The Seventh Circuit found no evidence to support the *Bartkus* sham prosecution exception to the dual sovereignty doctrine. The court also held that collateral estoppel could not apply, reasoning that "[i]t would be anomalous indeed if a sovereign were allowed the greater power of reprosecuting individuals for offenses for which they had been acquitted but were denied the lesser power of proving the underlying facts of such offenses." *Id.; see also United States v. Safari,* 849 F.2d 891 (4th Cir.1988) (prior state court prosecution did not have collateral estoppel effect on federal government's successive prosecution).[27]

Most of the courts that have considered collateral estoppel in successive prosecutions by separate sovereigns have applied the standards of the dual sovereignty doctrine and its exception. *Davis,* 906 F.2d at 832-34; *Garner,* 32 F.3d at 1311; *Tirrell,* 120 F.3d at 677; *Belcher,* 762 F.Supp. at 670-71; *Londono-Rivera v. Virginia,* 155 F.Supp.2d 551, 562-63 (E.D.Va.2001); *Rashed,* 234 F.3d at 1282-83. *Ashe,* which is based on the Double Jeopardy

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[27] In *United States v. Bonilla Romero,* 836 F.2d 39, 42 (1st Cir.1987), the First Circuit briefly discussed the "same party" issue under *Ashe* in a successive prosecution. However, in that case, the court held that jeopardy did not attach in the first prosecution and *Ashe* did not provide a basis for applying collateral estoppel. The court considered, but declined to decide, whether the Due Process Clause alone could support an application of collateral estoppel in a criminal case.

Clause of the Fifth Amendment, supports this approach. *Id.* Angleton's collateral estoppel argument fails for the same reasons his *Bartkus* sham prosecution exception argument fails; under the dual sovereignty doctrine, the state court acquittal does not bar the successive prosecution by the federal government.[28]

Even if this court applied a lower standard of privity to determine whether the successively prosecuting sovereigns are the same parties for collateral estoppel purposes, Angleton's argument would still fail. If traditional standards of collateral estoppel apply to this criminal prosecution, this court would give the Texas court judgment the same preclusive effect it would have under Texas law. *See McCoy v. Hernandez,* 203 F.3d 371, 374 (5th Cir.2000) (considering whether Texas police officers and the State of Texas were the same party for purposes of collateral estoppel) (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984)). Under Texas law, the party seeking to assert collateral estoppel must demonstrate: (1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) the facts determined were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. *See McCoy,* 203 F.3d at 374 (citing *Sysco Food Services v. Trapnell,* 890 S.W.2d 796, 801 (Tex.1994) (citations omitted); *State Farm Fire & Cas. Co. v. Fullerton,* 118 F.3d 374, 377 (5th Cir.1997)).

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[28] The Supreme Court has not addressed whether nonmutual collateral estoppel applies between successively prosecuting sovereigns. However, the Court has determined that nonmutual collateral estoppel does not apply between successively prosecuted defendants. In *Standefer v. United States,* 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980), the Supreme Court held that non-mutual collateral estoppel was unavailable to an alleged aider and abettor who attempted to estop the government from proving that he aided and abetted the alleged principal on the basis of the government's failure to convict the principal. The Court noted that, unlike civil litigation, criminal prosecutions involve the "important federal interest in the enforcement of the criminal law." *Id.* at 24-25, 100 S.Ct. 1999. The court held that policy considerations in criminal cases outweighed the "economy concerns that undergird the estoppel doctrine." *Id.* at 25, 100 S.Ct. 1999.

The federal government was clearly not a party to the prior state prosecution; Angleton must demonstrate that the federal prosecution was in privity with the state prosecution. Parties are in privity for the purposes of collateral estoppel when: (1) they control the action; (2) their interests are represented by a party to the action; or (3) they are successors in interest, deriving their claims through the party to the prior action. *HECI Exploration Co. v. Neel,* 982 S.W.2d 881, 890 (Tex.1998). "Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy, ... " *Benson v. Wanda Petroleum Co.,* 468 S.W.2d 361, 363 (Tex.1971); *see Eagle Props., Ltd. v. Scharbauer,* 807 S.W.2d 714, 721 (Tex.1990); *Bonniwell v. Beech Aircraft Corp.,* 663 S.W.2d 816, 819 (Tex.1984). Privity extends to those who are "so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." *Benson,* 468 S.W.2d at 363; *Cannon v. Tex. Indep. Bank,* 1 S.W.3d 218, 224 (Tex.App. – Texarkana 1999, pet. denied).

Applying these factors to the present case, without considering the dual sovereignty doctrine, this court finds that the federal government was not in privity with the

State of Texas. There is no evidence that the federal prosecution had controlled the state prosecution. To the contrary, Angleton does not claim that the federal prosecutors or investigators were involved in the state prosecution. The issue is whether the federal and state governments have "an identity of interests" such that the federal government is bound by the outcome of the state prosecution because the two governments had the same legal right. The Texas Court of Criminal Appeals considered a similar issue in *Reynolds v. State,* 4 S.W.3d 13 (Tex.Crim.App.1999). In *Reynolds,* the defendant was arrested for driving while intoxicated and his driver [sic] license was suspended pending an administrative hearing by the Department of Public Safety. At that hearing, the defendant argued that there was no reasonable suspicion for stopping him. The administrative body agreed. The state district attorney then successfully prosecuted the defendant for driving while intoxicated. Defendant argued on appeal that the district attorney was collaterally estopped from litigating this issue in the criminal proceeding because the district attorney's office and the Department of Public Safety were in privity. The Court of Criminal Appeals disagreed, explaining that the Department of Public Safety and state prosecutors do not have the same interest because they are controlled by different authorities. *Id.* at 15 (adopting concurring opinion of Judge Womack in *State v. Brabson,* 976 S.W.2d 182, 185 (Tex.Crim.App.1998) (explaining in detail the decision of the court on the issue of privity)).

In this case, it is undisputed that the Harris County District Attorney's Office controlled the first prosecution and the United States Attorney's Office for the Southern District of Texas is controlling the federal prosecution.

Texas law would not give the Texas state acquittal estoppel effect to bar this federal prosecution.

The Fifth Circuit has held that "collateral estoppel does not apply to successive prosecutions by the state and federal governments." *Hayes,* 589 F.2d at 811. The state prosecution does not collaterally estop this federal prosecution.

D. The Argument of an Inadequate Federal Interest: Section 1958, the Commerce Clause, and Double Jeopardy

Angleton argues that this successive federal prosecution for the murder of his wife, following a state acquittal for capital murder, raises serious constitutional issues that can only be avoided by reexamining the dual sovereignty doctrine; holding the application of section 1958 to this case unconstitutional under the Commerce Clause; or limiting the application of section 1958 to cases where an independent and compelling federal interest is present. Angleton argues that changes in the jurisprudence underlying the dual sovereignty doctrine, the increasing federalization of criminal law, and changes in the jurisprudence of the Commerce Clause make this federal prosecution untenable. Angleton argues that this court should avoid these constitutional issues by holding that the government must demonstrate to the court a sufficient, independent federal interest in prosecuting Angleton for murder for hire before this prosecution can proceed. Each of these arguments is examined below.

1. Changes in the Constitutional Underpinnings of the Dual Sovereignty Doctrine

Angleton adopts the argument of some courts, and a number of scholars, that the Supreme Court's decisions recognizing that the Bill of Rights, including the Double Jeopardy Clause, applied to the states and the increasing federalization of criminal law has undercut the constitutional underpinnings from the dual sovereignty doctrine and require a reexamination. *See United States v. All Assets of G.P.S. Automotive Corp.,* 66 F.3d 483, 498 (2d Cir.1995) (Calabresi, J., concurring) ("a new look by the High Court at the dual sovereignty doctrine and what it means today for the safeguards the Framers sought to place in the Double Jeopardy Clause would surely be welcome"); *United States v. Grimes,* 641 F.2d 96, 101 (3d Cir.1981); *United States v. Claiborne,* 92 F.Supp.2d 503, 509 (E.D.Va.2000) ("Where the Commerce Clause has been broadly expanded and the line between federal and state crimes has been blurred, . . . the rationale of the dual sovereignty doctrine is nullified . . . "), *aff'd,* 2001 WL 173163, *cert. denied,* 533 U.S. 938, 121 S.Ct. 2569, 150 L.Ed.2d 733; Braun, 20 AM.J.CRIM.L. at 42-54; Amar & Marcus, 95 COLUM.L.REV. at 5-20; Guerra, 73 N.C.L.REV. at 1159.[29] These commentators have noted

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[29] A different perspective is provided in *United States v. McHan,* 966 F.2d 134, 139 (4th Cir.1992), in which the court explained:

> The Double Jeopardy Clause imposes a rule of finality for criminal law judgments to protect persons from the burden, expense, embarrassment, and harassment of multiple prosecutions and punishments for the same offense. . . . But the rule does not restrict Congress in defining separate

(Continued on following page)

that although the Court has recognized these changes by overruling the dual sovereignty doctrine as it had been applied to other constitutional protections, *Lanza, Bartkus,* and *Abbate* have remained in place. Despite decisions recognizing that the application of Fourth Amendment principles against states required the rejection of the "silver platter" doctrine, and that the application of the Incrimination Clause to the states required the rejection of the dual sovereignty doctrine in the area of compelled self-incrimination, the Court has not discussed the impact of *Benton's* incorporation of the Double Jeopardy Clause on *Bartkus* and *Abbate.*

As noted earlier, however, after the change in the incorporation doctrine, and in the face of the criticisms and calls for reexamination of the dual sovereignty doctrine, the circuit courts have consistently continued to treat the dual sovereignty doctrine as valid. Angleton recognizes that this court is bound by *Abbate,* which held that a federal prosecution following a state prosecution was constitutional based on the dual sovereignty doctrine.

2. Changes in Commerce Clause Jurisprudence

Angleton also argues that recent changes in Commerce Clause jurisprudence indicate a willingness by the courts to reexamine the limits of Congress's Commerce

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offenses and prescribing punishments. . . . Moreover, its application has never been considered absolute. Rather, the prohibition against double jeopardy has regularly been applied to accommodate the government's interest in prosecuting persons who violate the law.

Clause power. He asserts that section 1958, as applied in this case, crosses those limits, eliminating the independent federal interest in pursuing this prosecution. In *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Court, for the first time in almost six decades, invalidated a federal criminal law as exceeding the scope of the Commerce Clause. The Court summarized its interpretations of the Commerce Clause as establishing "three broad categories of activity that Congress may regulate under its commerce power . . . Congress may regulate the use of the channels of interstate commerce . . . Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . Congress [has] the power to regulate those activities having a substantial relation to interstate commerce . . . *i.e.,* those activities that substantially affect interstate commerce." 514 U.S. at 558-559, 115 S.Ct. 1624. The statute at issue in *Lopez,* which made it a crime knowingly to possess a firearm in a school zone, did not fall within the first two categories. The Court analyzed the statute as a regulation of an activity affecting interstate commerce and found it unconstitutional because the statute "neither regulates a commercial activity nor contains a requirement that [the defendant's] possession of a firearm have been connected in any way to interstate commerce." *Id.* at 551, 115 S.Ct. 1624.

In *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), the Court held a provision of a federal statute providing a civil remedy to victims of gender-motivated crimes of violence unconstitutional as an invalid exercise of the third prong of the Commerce Clause power. *See id.* 120 S.Ct. at 1754. Neither the statute at issue in *Lopez* nor the provision involved in *Morrison* had a jurisdictional element establishing that the federal cause of action was in pursuance of Congress's power to regulate interstate commerce.

The Fifth Circuit has also recently reexamined the constitutionality of federal criminal statutes based on the regulation of activities affecting commerce. In a recent case, the Fifth Circuit, by an evenly-divided en banc vote, held that a conviction under the Hobbs Act for a series of fast food restaurant robberies was constitutional. *United States v. Hickman,* 179 F.3d 230 (5th Cir.1999), *affirming in relevant part,* 151 F.3d 446 (5th Cir.1998). The court has granted en banc rehearing on the issue. *United States v. McFarland,* 264 F.3d 557 (5th Cir.2001), *rehearing en banc granted,* 281 F.3d 506 (5th Cir.2002).

Unlike the statutes in *Lopez, Morrison,* or the Hobbs Act cases, section 1958 does not purport to regulate murder for hire because the activity affects interstate commerce. Rather, it is based on Congress's power to regulate either the channels of interstate commerce or the subjects of interstate commerce. The most recent case to test the continuing viability of statutes regulating the subjects of interstate commerce is *Reno v. Condon,* 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000). In *Condon,* the Court held the Driver's Privacy Protection Act constitutional under the Commerce Clause because the information it regulates is a "thing in interstate commerce." *Id.* Angleton argues that no recent Supreme Court case has tested whether a statute based on regulation of the channels of interstate commerce is constitutional when the use of those channels may be incidental to criminal activity and the criminal activity is not directed at commerce. However, in *Morrison,* the Supreme Court noted that another section of the statute created a federal criminal remedy to punish interstate crimes of abuse, including against spouses or intimate partners, during interstate travel, and crimes committed by spouses or intimate partners who crossed state lines to continue the abuse. *Morrison,* 529 U.S at 613, 120 S.Ct. 1740. The Court noted that the courts of appeals had uniformly upheld this criminal sanction as an "appropriate exercise of Congress' Commerce Clause authority, reasoning that '[t]he provision properly falls within the first of *Lopez's* categories as it regulates the use of channels of interstate commerce – *i.e.,* the use of the interstate transportation routes through which persons and goods move.'" *Id.* at 613 n. 5, 120 S.Ct. 1740 (quoting *United States v. Lankford,* 196 F.3d 563, 571-72 (5th Cir.1999)); *see also Jones v. United States,* 529 U.S. 848, 850-51, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000) (holding that "an owner-occupied private residence not used for any commercial purpose does not qualify as property 'used in' commerce or commerce-affecting activity" for purposes of the federal arson statute, 18 U.S.C. § 844(i)).

Section 1958 contains a jurisdictional element requiring travel in interstate commerce or use of a facility of interstate commerce. Its constitutionality is firmly established under existing Commerce Clause jurisprudence. *Morrison,* 529 U.S. at 613, 120 S.Ct. 1740; *United States v. Bailey,* 112 F.3d 758, 766 (4th Cir.1997) (upholding 18 U.S.C. § 2261(a) making it illegal to travel across a state line with the intent to injure, harass, or intimidate a spouse or intimate partner and intentionally commit a crime of violence against that person). Like the statutes upheld in these cases, the federal murder for hire statute requires interstate travel or use of interstate facilities, "thus placing the transaction squarely in interstate commerce." *Bailey*, 112 F.3d at 766; *Lankford*, 196 F.3d at 571-72.

Angleton argues that section 1958 as applied to this case raises serious questions regarding the outer limits of the Commerce Clause power because the link with interstate commerce is incidental to the alleged crime. Angleton points out that many of the successive federal prosecutions are cases involving civil rights violations, drug trafficking, or organized crime activities, in which the separate federal interest is clear. *Patterson*, 809 F.2d at 247; *Koon*, 34 F.3d at 1438; *Harrison*, 918 F.2d at 472. Angleton contends that the absence of any other federal interest, and the tenuous link to interstate commerce, make this prosecution improper.

Angleton's Commerce Clause arguments are foreclosed by Fifth Circuit precedent. The Fifth Circuit has recently confirmed the constitutionality of section 1958 in *United States v. Marek*, 238 F.3d 310 (5th Cir.2001) (en banc), interpreting the statute broadly to allow even intrastate use of a facility of interstate commerce to satisfy the jurisdictional element. In *Marek*, the court considered two murder for hire prosecutions, one of which involved international phone calls and the "hit-men" traveling from Mexico to Brownsville. The other case only involved intrastate transfers of money through Western Union. The court analyzed the statutory language and determined that intrastate use of a facility of interstate commerce satisfied the statute and the Constitution. *Id.* at 315-22 (citing *Caminetti v. United States*, 242 U.S. 470, 491, 37

S.Ct. 192, 61 L.Ed. 442 (1917) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses . . . is no longer open to question.")); *see also United States v. Weathers,* 169 F.3d 336 (6th Cir.1999) (use of cellular telephone satisfied jurisdictional element of section 1958).

Angleton urges that Congress's intent to limit section 1958 to cases involving significant federal interests is confirmed by the Department of Justice *Petite* Policy governing successive federal prosecutions. He argues that to allow a successive prosecution in this case under section 1958 is inconsistent with the legislative intent behind that statute and inconsistent with the *Petite* policy itself. Angleton asserts that this court should limit section 1958 by making it applicable only where there is a significant federal interest at stake – that is, by judicially implementing the *Petite* policy. (Docket Entry No. 38, at 35-38). However, the courts have consistently held that the *Petite* policy may not be enforced by a defendant against the government. *See Patterson,* 809 F.2d at 247 (citations omitted). The *Petite* policy is "not constitutionally mandated." *Rinaldi v. United States,* 434 U.S. 22, 28, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977) (per curiam). Angleton urges that the federal prosecutors be required to demonstrate a substantial federal interest to the court before this successive federal prosecution may proceed. Courts have consistently rejected imposing such a requirement. *See id.; United States v. Nelligan,* 573 F.2d 251, 255 (5th Cir.1978); *Basile,* 109 F.3d at 1308; *United States v. Schwartz,* 787 F.2d 257, 267 (7th Cir.1986); *United States v. Thomas,* 759 F.2d 659, 668 (8th Cir.1985); *United States v. Catino,* 735 F.2d 718, 725 (2d Cir.1984).

In the one reported federal prosecution under section 1958 that followed a state murder prosecution, *United States v. Basile,* 109 F.3d 1304 (8th Cir.1997), the court considered, and rejected, a very similar argument. In *Basile,* the wife of one of the defendants was found shot to death. The husband and the man he allegedly paid to have his wife shot were both tried in state court. The husband was acquitted on state murder charges. The husband was subsequently indicted in federal court under section 1958, convicted, and sentenced to life in prison. On appeal, he argued double jeopardy, asserting, as Angleton argues here, that the federal prosecution was for an "unremarkable case of spousal murder" with "questionable" federal interest. *Id.,* 109 F.3d at 1307. The court disagreed, stating that:

> while contract killing, standing alone, may not be a federal crime, it may become such when its perpetration involves the use of the mail or facilities in interstate commerce. The independence and importance of the federal interest in protecting the channels of interstate commerce from the taint of crime is unaffected by [defendant's] previous acquittal in state court; it remains just as important and worthy of vindication after the state trial as it was before. "[T]he federal government had an interest, independent of any state interest, to ensure that an individual who is believed to have violated a federal statute is prosecuted for that violation."

Id. (citations omitted).

Like Angleton, the defendant in *Basile* argued the absence of a compelling federal interest justifying a successive federal prosecution under section 1958 in terms of a misapplication of the *Petite* policy. The *Basile* court stated:

> We are not convinced that the federal prosecution in this case failed to meet the "compelling interests" requirement of the *Petite* policy. We need not and do not decide the question, however, because the *Petite* policy is "not constitutionally mandated," *Rinaldi,* 434 U.S. at 29, 98 S.Ct. at 85, and otherwise "confers no substantive rights on the accused," *United States v. Moore,* 822 F.2d 35, 38 (8th Cir.1987) (per curiam). Thus the DoJ's implementation of the policy "cannot form the basis of a claim [by a defendant] that the prosecution was improper." *United States v. Lester,* 992 F.2d 174, 176 (8th Cir.1993).

Id. A federal prosecutor may, in deciding to pursue a subsequent prosecution, "take into consideration what he deems is an 'inadequate result'" of the state proceedings. *United States v. Arena,* 180 F.3d 380 (2d Cir.1999) (citing *United States v. Ng,* 699 F.2d 63, 68 (2d Cir.1983)).

Angleton's argument that this court should avoid constitutional issues by requiring the government to show a compelling federal interest as a condition of prosecuting Angleton under the federal murder for hire statute is not a valid basis for dismissing this indictment.

IV. The Findings as to Frivolousness

The final procedural issue raised in this case is whether this court will continue to have jurisdiction to try the case during the interlocutory appeal from the denial of Angleton's motion to dismiss. In *Abney v. United States,* 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), the

Court held that the denial of a motion to dismiss an indictment on the basis of double jeopardy results in an appealable final order. The Court emphasized that the rights conferred under the Double Jeopardy Clause "would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence" because the Double Jeopardy Clause is not only a protection against twice being convicted, but is also a "guarantee against being twice put to trial for the same offense." *Id.* at 660-61, 97 S.Ct. 2034.

> Because of this focus on the "risk" of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction.

Id. at 662, 97 S.Ct. 2034. In a footnote, the Court noted that its holding "may encourage some defendants to engage in *dilatory* appeals." *Id.* at 662 n. 8, 97 S.Ct. 2034 (emphasis added). The Court noted, however, that such "problems of delay" could be ameliorated by expedited appeals and procedural rules issued under the courts' supervisory powers. *Id.*

In *United States v. Dunbar,* 611 F.2d 985, 987 (5th Cir.1980) (en banc), the Fifth Circuit put into place procedural rules for dual jurisdiction of trial and appellate courts during interlocutory appeals from orders denying motions to dismiss based on double jeopardy. These rules are designed to balance the need to review colorable double jeopardy claims before a successive trial that would in itself infringe the rights double jeopardy protects, against the risk of delay and disruption that would result from divesting the district court of jurisdiction to proceed any time a defendant takes an interlocutory appeal from a denial of a double jeopardy claim. The court recognized that "[s]ituations of this kind call for a rule which is both reflective of practical common sense and protective of the essence of the right of appeal recognized in *Abney.*" *Id.* at 988. The court reasoned that "failure to review a colorable double jeopardy claim before trial creates a substantial risk that the accused's constitutional rights will be infringed." *Id.* However, this risk must be balanced against the "great potential for disruption" caused by dilatory appeals. The court held that:

> Henceforth, the district courts, in any denial of a double jeopardy motion, should make written findings determining whether the motion is frivolous or nonfrivolous. If the claim is frivolous, the filing of a notice of appeal by the defendant shall not divest the district court of jurisdiction over the case. If nonfrivolous, of course, the trial cannot proceed until a determination is made of the merits of an appeal.

Id. The Fifth Circuit emphasized that such written findings by the district court would permit expeditious appellate review of the issues presented. If the circuit court disagreed with the court's determination that the claim was frivolous, it could grant a stay or a writ of mandamus pending appeal. If the circuit court did not issue a stay, permitting the trial to proceed pending the appeal, then found the appeal meritorious, the conviction in the district court would be reversed. If the appeal was found not to have merit, jurisdiction for the trial that had occurred during the appeal would be affirmed. *Id.* at 989. Other circuit courts have followed this approach. *See, e.g., United States v. Millan,* 4 F.3d 1038, 1044 (2d Cir.1993); *United States v. Leppo,* 634 F.2d 101, 105 (3d Cir.1980); *United States v. Head,* 697 F.2d 1200, 1204 & nn. 3-5 (4th Cir.1982); *United States v. Grabinski,* 674 F.2d 677, 679 (8th Cir.1982) (en banc); *United States v. Bizzard,* 674 F.2d 1382, 1385 (11th Cir.1982); *United States v. Black,* 759 F.2d 71, 73 (D.C.Cir.1985).

The government argues that this court must find Angleton's claims are frivolous because he has failed to establish a *prima facie* case of double jeopardy. (Docket Entry No. 51, at 3). Angleton responds that the government's argument improperly conflates the standard for determining a *prima facie* case of double jeopardy and the standard for a nonfrivolous or "colorable" claim of double jeopardy. Angleton argues that even if this court finds he has not made a *prima facie* case under existing law defining and applying the dual sovereignty doctrine, he has nonetheless made colorable, nonfrivolous arguments supporting a reexamination of that doctrine, as applied to the particular facts presented by this case. Angleton identifies four issues as "not insubstantial. . . . fairly debatable . . . or of arguable merit factually and legally." (Docket Entry No. 79, at 3, *citing United States v. Becton,* 498 F.Supp. 1013, 1025 (S.D.Tex.1980)).

- "[I]n the era of the State/Federal task force, an issue of whether *Bartkus/Abbate* are still relevant (the broad question)";

- "[T]he question of whether, by the guise of regulating commerce among the States, the Federal Executive can re-litigate an issue of violation of a State Statute by adopting that statute into a derivative federal statute (a more narrow question)";

- "[T]he question of when the State/Federal task forces become sufficiently intertwined so that estoppel begins to bite"; and
- "[T]he question of whether the Courts need to adopt and enforce something similar to the . . . *Petite* Policy."

(*Id.*). Angleton in effect urges that even if his arguments have little likelihood of success under current law, he has raised colorable challenges to the application of the law to the unusual facts of this case, inconsistent with a finding of frivolousness.

A. The Frivolousness Standard under *Dunbar*

In *United States v. Dunbar,* 611 F.2d 985 (5th Cir.1980), the defendant had been convicted of conspiracy to possess a controlled substance with the intent to distribute. He had also been indicted for five counts of the substantive offense of distributing controlled substances. A few days before his trial on the substantive offenses was to begin, Dunbar moved to prevent the introduction of evidence used in the prior conspiracy trial, asserting double jeopardy. A panel of the Fifth Circuit held that the double jeopardy motion was "both frivolous and dilatory," and "totally devoid of merit," but that the interlocutory appeal from the denial of the double jeopardy claim divested the district court of jurisdiction to proceed with the trial. The Fifth Circuit reversed, en banc, holding that a district court denying a double jeopardy motion must make a finding as to whether the motion is frivolous or nonfrivolous. If frivolous, the district court would continue to have jurisdiction pending the appeal. If nonfrivolous, the trial could not proceed until the merits of the appeal were determined. 611 F.2d at 988. The Fifth Circuit noted that "district courts are not strangers to making a determination of whether matters are frivolous," citing as examples the determination whether to deny bail because an appeal is frivolous under 18 U.S.C. § 3148, and the determination whether to deny leave to proceed *in forma pauperis* to file a frivolous appeal under 28 U.S.C. § 1915(a). The court observed that the frivolousness determination was already part of the jeopardy analysis: "[i]ndeed, in considering a double jeopardy motion, the district court must determine whether a defendant has tendered a *prima facie* nonfrivolous double jeopardy claim before shifting the burden of persuasion to the Government." *Id.* (citing *Stricklin,* 591 F.2d at 1117-18).

In *United States v. Kalish,* 690 F.2d 1144, 1147 (1982), the Fifth Circuit reversed a district court's denial of a double jeopardy plea as to the conspiracy counts of an indictment, while affirming the conviction on the substantive counts. The double jeopardy issue turned on whether the defendant carried out his alleged narcotics transactions as a member of one or more conspiracies. The Fifth Circuit held that the defendant had made a *prima facie,* nonfrivolous claim that the indictments charged the same conspiracy and that the government had failed to meet its burden of showing that the indictments charged different conspiracies. The court noted that its "function on appeal is not to review the district court's finding of frivolousness," but rather to determine whether the claim has actual merit. However, the appellate court criticized the district court for finding frivolousness. In *Dunbar,* the double jeopardy argument "was a purely legal one which was foreclosed by numerous decisions of the Supreme Court and of this court." 690 F.2d at 1154. In *Kalish,* by contrast, the double jeopardy claim was complicated and fact-ridden: did the defendant conduct his drug activities as part of one conspiracy or different conspiracies? The Fifth Circuit concluded that it was "mystified" by the district court's characterization of this issue as "frivolous." *Id.* The Fifth Circuit cautioned that

> district courts must adhere to the literal meaning of the term "frivolous". . . . The whole purpose of *Abney* is defeated when district courts proceed to trial because they do not believe the defendant's double jeopardy plea is sufficiently meritorious to warrant a stay. *Dunbar* was intended to prevent dilatory claims, not colorable ones.

Id.

Other courts have held that double jeopardy claims are not frivolous when the claim is complicated or raises legal issues not clearly foreclosed by binding precedent, even if the claim is rejected on the merits. In *United States v. Aguilera,* 179 F.3d 604 (8th Cir.1999), for example, the Eighth Circuit considered a case in which the district court denied a motion to dismiss based on double jeopardy, but failed to make a finding as to frivolousness. The court held that the double jeopardy claim was not frivolous because the district court held a hearing and considered more than just the indictments. *See also United States v. Kress,* 58 F.3d 370 (8th Cir.1995) (double jeopardy claim not frivolous considering the depth of the district court's analysis, notwithstanding that the Eighth Circuit found the claim unsuccessful); *United States v. McHan,* 966 F.2d 134 (4th Cir.1992) (double jeopardy claim asserted to bar indictment for drug conspiracy and continuing criminal enterprise based on prior guilty plea to drug conspiracy in same period was not frivolous, because determining whether the indictments charged the same offense required complex analysis of facts to determine whether predicate offense was lesser included offense of multilayered crime, even though appellate court found the jeopardy claim without merit); *United States v. Wood,* 950 F.2d 638 (10th Cir.1991) (double jeopardy claim following district court's grant of new trial following jury's exposure to extraneous material during deliberations was colorable because facts were sufficiently distinguishable from Supreme Court precedent to escape characterization as frivolous). Echoing the Fifth Circuit's description of the nature of the double jeopardy claim in *Dunbar,* the Ninth Circuit has stated that purely legal claims are frivolous when the outcome is "clear" upon "long-standing case law" binding in that circuit. *United States v. LaMere,* 951 F.2d 1106 (9th Cir.1991).

The Supreme Court has also discussed, in *dicta,* when a double jeopardy claim is appealable under *Abney.* In *Richardson v. United States,* 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), the Court considered a claim that a mistrial based on insufficiency of the evidence barred a retrial. The Court held that the Double Jeopardy Clause did not bar retrial. The Court found, however, that the defendant has raised a "colorable" claim, appealable under *Abney. Id.* at 322, 97 S.Ct. 2034. In a footnote, the Court advised that in the future, similar claims would no longer be "colorable" because the Court had issued a conclusive ruling on the issue. The Court stated: "[a] colorable claim, of course, presupposes that there is *some possible validity* to a claim. Since no set of facts will support the assertion of a claim of double jeopardy like petitioner's in the future, there is no possibility that a defendant's double jeopardy rights will be violated by a new trial. . . . " *Id.* at 326 n. 6, 97 S.Ct. 2034 (emphasis added).

This court applies these standards to Angleton's double jeopardy claims.

B. Analysis

The threshold question is whether this court's finding that Angleton failed to make a *prima facie* showing of double jeopardy precludes a finding that he has raised any nonfrivolous issues on appeal. The government's argument is supported by the language in *Dunbar* emphasizing the relationship between the district court's determination under *Stricklin* that the defendant has tendered a *prima facie* nonfrivolous double jeopardy claim before shifting the burden of persuasion to the government, and the district court's determination that the claim was frivolous under *Abney*. However, this observation does not end the analysis.

Neither *Dunbar* nor *Stricklin* involved successive prosecutions under the dual sovereignty doctrine. In those cases, the defendant had the burden of making a nonfrivolous *prima facie* showing that the indictments charged the same offenses. This court has found that Angleton did make a *prima facie* showing under *Blockburger* that the state and federal indictments charged the same offenses, but that the government then met its burden of showing different offenses in the two indictments by virtue of the dual sovereignty doctrine. As to this threshold showing, this court's denial of the double jeopardy motion does not preclude a finding that Angleton's argument is nonfrivolous.

Angleton then argued that under *Bartkus* and its progeny, the degree of state involvement in this federal prosecution makes it, in effect, a state prosecution and a sham. This court has found that Angleton failed to make a *prima facie* nonfrivolous showing of collusion sufficient to trigger the *Bartkus* exception. *See Harrison,* 918 F.2d at 475; *Patterson,* 809 F.2d at 247. *Bartkus* itself involved such extensive involvement by the first sovereign in the second sovereign's prosecution as to make the standard for a *prima facie* showing of collusion extraordinarily high. The Fifth Circuit cases involving *Bartkus* are few in number and not fully on point. However, the cases from the Fifth Circuit, as well as other circuits, make it clear that Angleton's double jeopardy claim based on the *Bartkus* exception is precluded by current law. *See Harrison,* 918 F.2d 469; *Whalers Cove,* 954 F.2d at 38 (suggesting that one sovereign "must have effectively manipulated the actions of the [other sovereign] so that [its] officials retained little or no independent volition."); *Guzman,* 85 F.3d at 827 (exception limited to situations in which one sovereign "thoroughly dominates or manipulates the prosecutorial machinery of another"); *accord Rashed,* 234 F.3d at 1283; *Baptista-Rodriguez,* 17 F.3d at 1361; *Kunstler,* 914 F.2d at 517; *Liddy,* 542 F.2d at 79. This court concludes that Angleton's double jeopardy claim based on the degree of involvement by the state authorities in the federal prosecution, the *Bartkus* exception, is frivolous.

Angleton's double jeopardy claim based on his argument that because the federal indictment incorporates and derivatively enforces that state statute, the dual sovereignty doctrine does not apply, is a purely legal argument. It is based on a comparison of the elements of the federal murder for hire statute and the elements of the state statute that it "incorporated," different from the *Blockburger* test at issue in *Stricklin* and from the *Bartkus* sham prosecution exception. This court found Angleton's argument unpersuasive on several grounds, including that the relationship of the state and federal statutes in *Houston v. Moore* was far closer than the relationship of the state and federal statutes at issue here. However, only one reported circuit court case, *United States v. Basile,* 109 F.3d 1304 (8th Cir.1997), has considered a double jeopardy challenge to a successive prosecution under the federal murder for hire statute following a state prosecution for capital murder. There is no indication that the defendants in *Basile* raised the argument that the incorporation of the state statute into the federal law precluded the successive prosecution by the federal government. This claim is not frivolous under *Dunbar* and related cases; it is a purely legal argument, but it is not addressed or specifically foreclosed by decisions of the Supreme Court or this circuit.

Angleton's claim that the Double Jeopardy Clause and the Commerce Clause are strained beyond constitutional limits if applied to this successive federal murder for hire prosecution following the state capital murder acquittal is, at bottom, an argument that the dual sovereignty doctrine should be modified or limited.[30] Angleton emphasizes

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[30] To the extent Angleton's Commerce Clause argument seeks a determination by this court that section 1958 is unconstitutional, that argument is clearly foreclosed and is not an argument based on double jeopardy. As the Fourth Circuit noted in *Head,* 697 F.2d at 1204-05, a claim is frivolous under *Abney* when it is "advanced as one of 'double jeopardy' [but] is manifestly not that in substantive content." Angleton's

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changes that have occurred since *Bartkus* and *Abbate* were decided – the increasing federalization of federal criminal law and the Supreme Court's narrowing of the permissible use of the Commerce Clause – to support his arguments for reexamining and limiting the dual sovereignty doctrine, at least as applied to the unusual facts presented here. His arguments raise an issue unaddressed in cases involving appeals under *Abney*: is an argument for a modification of the existing law of double jeopardy, at least as applied to the unusual facts of a particular case, by definition and without exception frivolous?

Angleton is far from the first to argue that some of the assumptions on which *Lanza, Bartkus, Abbate,* and their progeny rest have changed, based on the fact that *Lanza, Bartkus,* and *Abbate* were all decided by closely divided Courts and that the Supreme Court has not specifically addressed the federalism aspects of the dual sovereignty doctrine since 1959, which was before the Court recognized that the Double Jeopardy Clause applies to the states, before the vast increase in federal criminal law, and before the Court recognized limits to the Commerce Clause. *See, e.g., GPS Automotive,* 66 F.3d at 497-99 (Calabresi, J., concurring) (urging reexamination of the dual sovereignty doctrine). On the other hand, circuit courts have repeatedly, consistently, and recently rejected arguments very similar to those Angleton makes as grounds for questioning or limiting the dual sovereignty doctrine. *See Figueroa-Soto,* 938 F.2d at 1018 (after *Benton v. Maryland,* "nothing in this extension of the Constitution

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claim that section 1958 is unconstitutional is not a double jeopardy claim and is frivolous.

changed the *Lanza* rule. The proposition that the state and federal governments may punish the same conduct has been reaffirmed."); *Tirrell,* 120 F.3d at 676 ("although the doctrine has received some judicial and scholarly criticism over the years," it has remained binding); *Basile,* 109 F.3d at 1307 (in a successive federal prosecution under section 1958 following a state trial for contract murder of spouse of one of the defendants, court rejected argument that it should revisit the dual sovereignty doctrine and the rule that a court cannot enforce the *Petite* policy by insisting that the prosecution serve compelling federal interests).

In *Dunbar,* the court admonished district courts to examine other contexts in which findings are made as to frivolousness as a guide to its application in an *Abney* appeal. In *Kalish,* the court admonished district courts to adhere to the literal meaning of the term "frivolous," emphasizing that the *Dunbar* procedure was intended to prevent dilatory claims, not colorable ones. A brief examination of the term "frivolous" in these other contexts is instructive. In the context of determining whether arguments are frivolous for the purpose of imposing sanctions, courts examine whether "they are warranted by existing law or any plausible good faith argument for the extension, modification or reversal of existing law." *Reed v. Commercial State Bank of El Campo,* 861 F.2d 1381, 1383 (5th Cir.1988); Fed.R.Civ.Pro. 11(b)(2).[31] The frivolous

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[31] The 1993 Advisory Committee Notes to Rule 11 state that "arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate [Rule 11] provided they are 'nonfrivolous.' . . . the extent to which a litigant has researched the issues and found some support for its theories even in minority

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standard used in 18 U.S.C. § 1348 to determine whether to grant bail pending appeal provided, at the time *Dunbar* was decided, that "[a] person . . . who has been convicted of an offense and . . . has filed an appeal . . . shall be treated in accordance with the provisions of [18 U.S.C. § 3146] unless . . . it appears that an appeal is frivolous or taken for delay. . . . "[32] *Dunbar* also referred to the frivolousness determination made in connection with requests for leave to appeal in *forma pauperis* under 28 U.S.C. § 1915(a), citing *Coppedge v. United States,* 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962). Section 1915(a) provides that "[a]n appeal may not be taken in *forma pauperis* if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a). In *Coppedge,* the Supreme Court interpreted this provision as applied to a criminal appeal. 369 U.S. at 443, 82 S.Ct. 917. The Court held that "a defendant's good faith in [a criminal] case [is] demonstrated when he seeks appellate review of any issue not frivolous." *Id.* at 445, 82 S.Ct. 917. The Court explained:

> It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately. He is to be heard, as is any appellant in a criminal case, if he makes a rational argument on the law or facts.

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opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account. . . . "

[32] The standard under 18 U.S.C. § 1348 was replaced by a stricter standard in the Bail Reform Act of 1984. *See United States v. Valera-Elizondo,* 761 F.2d 1020, 1023 (5th Cir.1985).

Id. at 447-48, 82 S.Ct. 917. *See also Richardson v. Spurlock,* 260 F.3d 495, 498 (5th Cir.2001) ("stating that a complaint is frivolous if it lacks an arguable basis in law or fact; a complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist.").

Angleton acknowledges that many of his arguments challenge the application of existing case law. He urges the modification of long-standing precedent as applied to a case in which the indictment in the successive prosecution alleges a violation of a federal statute that incorporates and derivatively enforces the state law that was the subject of the prior state acquittal, and the federal basis for prosecution is created through the incidental use of interstate travel and facilities of interstate commerce. This court holds that under existing precedent, Angleton's double jeopardy claim is without merit. However, Angleton's argument for modifying and narrowing the dual sovereignty doctrine as applied to the facts disclosed on this record is not frivolous; it may well fail, but is not frivolously asserted.

Angleton did not wait until the eve of trial to assert a double jeopardy claim. There is no suggestion that he has asserted this claim solely for the purpose of delaying this second trial. While there is always delay and disruption attendant to an interlocutory appeal that stays the trial pending the outcome, that delay is relatively small in this case, as compared to the three and one-half years that elapsed between Angleton's state trial and the issuance of the federal indictment. This court finds that Angleton's argument for modification and limitation of the dual sovereignty doctrine in a case in which the federal statute under which the defendant is prosecuted incorporates the state statute under which that defendant was previously acquitted is not frivolous.

V. Conclusion

This court DENIES Angleton's motion to dismiss based on the Double Jeopardy Clause and enters the findings as to frivolousness as stated above.